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# In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 575

ALBERT A. ARVIDSON, et al.,
*Petitioners,*

vs.

REYNOLDS METALS COMPANY, a corporation,
*Respondent.*

W. J. WHITEAKER, et al.,
*Petitioners,*

vs.

REYNOLDS METALS COMPANY, a corporation,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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## INDEX


Page

Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit ..... 1

Opinions Below ..... 2

Jurisdiction ..... 2

Question Presented ..... 2

Statutes Involved ..... 3

Statement of the Cases ..... 3

Basis for the District Court's Jurisdiction ..... 8

Reasons for Allowance of the Writ ..... 9

Conclusion ..... 75

Appendix A:

Part I:

Opinion of the District Court ..... 77

Part II:

Opinion of the Court of Appeals for the Ninth Circuit ..... 94

Part III:

Opinion of the Trial Court (not by the District Judge) ..... 95

Appendix B:

Revised Code of Washington, § 4.16.080 ..... 100

Revised Code of Washington, § 4.16.130 ..... 101

## CITATIONS

### CASES


Page

Arvidson, et al. v. Reynolds Metals Company, 107 F. Supp. 51 ..... 9, 15

Clark Lloyd Lbr. Co. v. Puget Sound & Cascade Ry. Co., 92 Wash. 601, 159 Pac. 774 ..... 18, 37, 40

Constable v. John P. Duke, 144 Wash. 263, 257 Pac. 637 ..... 37, 40

Gray v. Harris & Son, 200 Wash. 181, 93 P. (2d) 385 ..... 17

Irwin v. J. K. Lumber Co., 119 Wash. 158, 205 Pac. 424 ..... 37, 40

Kerr, et al., and McCallister, et al. v. Reynolds Metals Company ..... 20, 21

Luellen v. Aberdeen, 20 Wn. (2d) 594, 148 P. (2d) 849 ..... 37, 39

Paul Martin and Verla Martin v. Reynolds Metals Company, Civ. No. 6151 (D. Ore.) ..... 6

McAllister v. United States of America, 348 U.S. 19 ..... 41

Noble v. Martin, 191 Wash. 38, 70 P. (2d) 1064 ..... 37, 40

Northern Grain & Warehouse Co. v. Holst, 95 Wash. 312, 163 Pac. 775 ..... 37, 38, 39, 40, 41

Oxley v. Linnton Plywood Ass'n., 205 Ore. 78 ..... 75

Riblet v. Spokane-Portland Cement Co., 41 Wn. (2d) 249, 248 P. (2d) 380 ..... 12, 14

Suter v. Wenatchee Water Power Co., 35 Wash. 1, 76 Pac. 298 ..... 10, 11, 12, 13, 14, 15

John M. Thorup and Kate W. Thorup v. Reynolds Metals Company, Civil No. 5884 (D. Ore.) ..... 7

Ure v. United States, 93 F. Supp. 779, aff'd sub nom White v. U. S. (CA9), 193 F. (2d) 505 ..... 20, 21

## CITATIONS (Cont.)


Page

Welch v. Seattle & Montana R. Co., 56 Wash. 97, 105 Pac. 166 ..... 16, 21

Weller v. Snoqualmie Falls Lbr. Co., 155 Wash. 526, 285 Pac. 446 ..... 12, 14


### STATUTES


28 U.S.C.A. Sec. 1332 ..... 8

Rule 52, F.R.C.P. ..... 41

Revised Code of Washington (R.C.W.)

4.16.080 ..... 3, 39, 40

4.16.080(1) ..... 3, 11

4.16.080(2) ..... 3, 37, 38, 39, 40

4.16.130 ..... 3, 37, 38, 39

52 Am. Jur., Trespass, Sec. 12, p. 844 ..... 22

32 C.J.S., Evidence, Sec. 569 ..... 75

87 C.J.S., Trespass, Sec. 13 ..... 21


### TEXT


I Restatement of the Law of Torts, Sec. 158 ..... 19

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**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT**

*To The Honorable, The Chief Justice and The Associate Justices of The Supreme Court of the United States:*

Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the Ninth Circuit, entered in the above entitled cases in the Court of Appeals on August 17, 1956.

## OPINIONS BELOW

The opinion of the District Court for the Western District of Washington, Southern Division, is printed in Appendix A, Part I hereto, infra p. 77 and is reported in 125 F. Supp. 481. The opinion of the Court of Appeals is printed in Appendix A, Part II hereto, infra p. 94, and is reported in 236 F. (2d) 224. An opinion of the trial Court but not by the trial Judge is printed in Appendix A, Part III hereto, infra p. 95, and is reported in 107 F. Supp. 51.

## JURISDICTION

The judgment of the Court of Appeals was entered in that Court August 17, 1956 (Tr.[1] X—2589). The mandate of the Court of Appeals was stayed on October 4, 1956 by order of that Court until November 15, 1956, which is within the 90-day period allowed for the filing of this petition by 28 U.S.C.A. Sec. 2101 (c).

## QUESTIONS PRESENTED

(1) Does a complaint alleging that solids were deposited on Washington lands state a Washington cause of action for trespass as distinguished from trespass on the case; (2) were solids continuously and repeatedly deposited on plaintiffs' lands within the two-year limita-

[1]References to "Tr." herein refer to pages of the original transcript of record, the Roman numerals referring to volume and the Arabic numbers to page, in the transcript heretofore filed in this Court by the Clerk of the Court of Appeals.

tions period held applicable by the trial Court and up to the time of trial; (3) was the trial Court correct in holding that plaintiffs' claims for injury to personal property were limited by the Washington personal property two-year statute rather than the Washington three-year statute; and (4) were plaintiffs' cattle injured substantially within the two-year period held applicable and up to the time of trial.

## STATUTES INVOLVED

The statutory provisions involved are Revised Code of Washington (R.C.W.) 4.16.080, particularly sub-sections (1) and (2) thereof; and R.C.W. 4.16.130. R.C.W. 4.16.080 and 4.16.130 are printed in Appendix B hereto, infra p. 100.

## STATEMENT OF THE CASES

In December, 1950 (I-84), the *Arvidson* petitioners filed their complaint in the Western District of Washington, Southern Division. The *Whiteaker* petitioners filed theirs in that Court in November, 1952 (I-84). The actions were tried together. The *Arvidson* action was concerned with respondent's Troutdale, Oregon aluminum reduction plant and the Whiteaker action was concerned with respondent's Longview, Washington aluminum reduction plant. Paragraph V of each complaint (I-4, 120) alleged that respondent deposited particulates (i.e., solids) on petitioners' real properties all located in Washington. By reason of such deposit, petitioners

claimed damage to their real properties and to the personal properties located thereon.

Because of Paragraph V, we think petitioners in both cases pleaded (and later proved) a trespass as distinguished from trespass on the case as to their real properties. By reason of such pleading and because of what we think is the applicable subdivision of the Washington statute of limitations, we believe petitioners were entitled to prove damages to their real properties starting at a date three years prior to filing their complaints. Since the statute referred to deals with trespass and the limiting period therein is three years, we think it applies to these cases.

As to their personal properties, we think petitioners were also entitled to the benefit of the Washington three year statute of limitations. This is so, we believe, not because petitioners pleaded a trespass as to personalty, but because of a distinct personalty subdivision of the three year Washington limitations statute specifically covering " . . . taking, detaining or injuring personal property . . . " whatever may have been the theory of the complaints as to personalty.

Whether petitioners pleaded or proved a trespass as to their real properties was a legal question which was ruled on by the trial court in a number of ways both before and after the trial. What limitations period was involved was one of those rulings. The trial court also considered and ruled before and after trial whether petitioners were entitled to the Washington three year statute as to personalty. A more detailed consideration of

these rulings appears under our Reasons for Allowance of the Writ below. It seems enough to say here that the orders (I-12, 138) and findings on limitations and on trespass adverse to petitioners present the principal questions involved in this Petition.

To assist this Court in understanding the issues we believe it important to note at the outset that one supposed "factual" basis for the trial Court's decision has no support in fact at all. The trial Court said in its written decision:

> "In a number of cases previously heard in this and other courts in this area awards for fluoride damage resulting from operation of the Troutdale and Longview plants have been allowed, but every such case involved periods when little, if any, fume control measures were taken and before the installation of the later of the fume control improvements referred to." (I-87; App. A, Part I, p. 80)

According to this quotation, the unique feature of the present cases is that for the first time a court in the Pacific Northwest was confronted with fluoride claims involving periods of time after installation of the "later of the fume control improvements" at the Troutdale and Longview plants. As the trial court (I-86; App. A, Part I, p. 79) noted, the "later improvements" at Troutdale were completed in November 1950 and at Longview in 1949. The exact dates are Troutdale, November 3, 1950 (I-25) and Longview, May 14, 1949 (I-151).

The fact is that of the four fluoride cases tried in Pacific Northwest federal courts, one involved operations of the Troutdale plant *after* November 3, 1950 and one

involved operations of the Longview plant *after* May 14, 1949. In both cases liability was found and damages awarded. One of the remaining two cases involved Aluminum Company of America and the other involved the Troutdale plant before November 3, 1950.

The Troutdale case involving a claim for damages after November 3, 1950, was *Paul Martin and Verla Martin v. Reynolds Metals Company,* Civil No. 6151 (D. Ore.). Trial of that case began December 8, 1952, before the then Chief Judge of the Oregon District, James Alger Fee, sitting without a jury. Judge Fee signed his findings and conclusions as Circuit Judge December 18, 1954. Additional finding No. III read as follows:

> "III. The amount of damage sustained by the plaintiffs with respect to their lands aforesaid and cattle operations thereon for the period from the commencement of operation of the Troutdale plant on September 23, 1946, by the defendant, up to the date of the filing of the complaint in this action on the 22nd day of August, 1951, is the sum of $47,135.00."

Additional finding No. V read as follows:

> "V. During May of the year 1951, the plaintiffs placed upon their said lands a test herd of healthy young cows, calves and bulls, approximately 30 in number, and prior to and at the time of the trial of this action some of the animals in said test herd unmistakably showed evidence of having ingested more than a normal amount of flourine, and two of the animals slaughtered the day of the trial commenced unmistakably showed flourosis and had toxic quantities of flourine in their bones and tissues."

As just noted, the "later improvements" at Troutdale were completed November 3, 1950. Obviously the above two findings, particularly Finding No. V, can mean only that defendant in the *Martin* case was causing damage in 1951. In fact, Finding No. V goes further and means defendant was causing damage in 1952 up to the time of trial December 8, 1952.

The Longview case involving a claim for damages after May 14, 1949, is *John M. Thorup and Kate W. Thorup v. Reynolds Metals Company*, Civil No. 5884 (D. Ore.) also tried before Judge Fee without a jury beginning August 25, 1952. Finding No. XIX signed by Judge Fee in that case on January 9, 1953, read as follows:

> "XIX. Fluorides emanating from defendant's aluminum reduction plant in the period January 5, 1945 to August 25, 1952, did settle upon plaintiffs' real property in amounts sufficient to cause and did cause injury and damage to the dairy animals which grazed on the vegetation growing there. Said fluorides caused damage to plaintiffs in the amount of $14,241.26."

Finding XIX thus covers a damage period over three years after May 14, 1949.

To summarize, the *Martin* and *Thorup* findings mean defendant (respondent here) was causing damage at both plants not only after the "later improvements" at each, but late in the year 1952. Trial of the cases at bar began November 4, 1953 (I-102-A, 208-A).

We regret that Judge Fee's opinions in the *Martin* and *Thorup* cases are not reported. We also regret hav-

ing to quote from the findings in those cases since they are not in the Transcript in the cases at bar. However, *they were not before the trial court either,* and we feel we must correct the impression created by the trial court's decision that the cases at bar presented for the first time a claim of fluoride damage after completion of the "later improvements" at the Troutdale and Longview plants. In this connection, respondent's counsel in the cases at bar were also counsel in the *Martin* and *Thorup* cases.

As indicated, the trial Court handed down a decision denying liability in both cases, principally on the ground that the deposit of solids on Washington lands is not a Washington trespass. Of course, damages were not allowed. The cases were consolidated on appeal and the Court of Appeals affirmed *per curiam*. The Opinion of the Court of Appeals affirmed on the Opinion of the District Court (X-2588; App. A, Part II, p. 95). Questions in addition to the one just stated are set out under "Questions Presented" supra, pp. 2-3, and will be discussed briefly below.

## BASIS FOR THE DISTRICT COURT'S JURISDICTION

Jurisdiction of the District Court was predicated upon diversity of citizenship and amount in controversy under 28 U.S.C.A. § 1332.

## REASONS FOR ALLOWANCE OF THE WRIT

The principal point in the District Court's opinion (on which the Court of Appeals' *per curiam* opinion and judgment are based) is that complaints alleging that solids were deposited on Washington lands do not state Washington causes of action for trespass. ***This is a decision of an important question of Washington law in conflict with applicable Washington decisions.***

The trial Court ruled several times whether a complaint alleging that solids were deposited on Washington lands stated a cause of action for trespass as distinguished from trespass on the case. The question was first presented to Judge James Alger Fee, then an Oregon District Judge, now a Judge of the Court of Appeals for the Ninth Circuit. Judge Fee was sitting in Tacoma, Washington, and respondent moved to transfer the *Arvidson* case from the Western District of Washington, Southern Division, where it was filed, to the District of Oregon. In an opinion reported in 107 F. Supp. 51 (App. A hereto, Part III), Judge Fee, after analyzing the complaint, denied transfer principally on the ground, as noted in the trial Court's decision, that an Oregon court would lack jurisdiction over a *foreign* trespass upon real property because the Oregon Supreme Court had so held. To the trial Judge this was not an opinion on Washington law (I-96; App. A, Part I, p. 89).

What Washington period of limitations applied came before the trial Court upon respondent's motion before trial. The trial Court by the trial Judge handed down an informal memorandum and entered orders (I-12, 138) before trial providing that the real properties claims and personal properties claims (of which more below), set forth in both complaints were limited by the Washington two-year statute of limitations.

Finally, both the substantive law of trespass and Washington limitations as to realty in both actions came up on the evidence after trial and were dealt with extensively in the trial Court's decision. The Court quoted from its informal memorandum on the limitations point in again ruling that the two-year statute applied. The trial Court first held that Judge Fee's ruling denying transfer was not a ruling on the Washington law (I-96; App. A, Part I, p. 89). The Court then applied its own view of the Washington law both as to limitations (I-97; App. A, Part I, p. 90) and as to the substantive law (I-99; App. A, Part I, p. 91) concluding for both purposes that the actions were trespass on the case actions and not actions in trespass. In so ruling the Court relied principally upon *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 76 Pac. 298. The Court recognized that " . . . In all probability some areas in the near vicinity of the plants receive deposits of particulates or solids in a minute and powdery form . . ." (I-92, App. A, Part I, p. 85). Nevertheless, the Court held that only where the claimed injury is direct, does trespass lie; in the cases at bar, the injury, if any, was indirect and the actions were therefore trespass on the case actions (I-99-100; App.

A, Part I, p. 91). After explaining that the Washington cases, especially the *Suter* case required this distinction, the Court concluded:

> " . . . Even though it were assumed that solids in the form of minute particulates from defendant's plants have been deposited on plaintiffs' lands, the injury, if any, resulting therefrom was consequential, the action is on the case, and awards of nominal damages would not be justified by the facts or required by the law." (I-100; App. A, Part I, p. 92).

This quotation plus the Court's reliance on the *Suter* opinion (which was a negligence case) is fundamental to the trial Court's conclusion that trespass was not alleged or proved as a matter of law. The Court's view was that the deposits of solids is not enough. There must not only be injury, but direct injury. Our view, on the contrary, is that in a trespass case damages are *presumed* from the breaking (the deposit of solids) of the close: actual damages which is what the above extract appears to be discussing, have nothing to do with a trespass case.

We have suggested and the trial Court recognized that the law of limitations and the substantive law of trespass upon real properties are connected. They are connected because the three year Washington limitations statute (R.C.W. 4.16.080 (1) ) specifically covers trespass actions. It reads so far as presently applicable:

> "Within three years:
>
> "1. An action for waste or trespass upon real property; * * * ."

In holding that this three year statute did not apply, the trial Court cited only *Suter v. Wenatchee Water*

*Power Co.*, 35 Wash. 1, 76 Pac. 298; *Weller v. Snoqualmie Falls Lbr. Co.*, 155 Wash. 526, 285 Pac. 446, and *Riblet v. Spokane-Portland Cement Co.*, 41 Wn. (2d) 249, 248 P. (2d) 380 (I-97-98; App. A, Part I, p. 90). None of these three cases was pleaded in trespass. The *Suter* case was pleaded in negligence and the *Weller* and *Riblet* cases were pleaded in nuisance. Because of these pleadings, it is difficult to see how the trespass statute could have been held applicable.

The facts in the *Suter* case were that defendant had constructed an irrigation canal. The complaint alleged that the canal had been negligently constructed so that surplus water escaped and flowed over plaintiffs' lands. A demurrer to this complaint on the ground that the acts complained of occurred more than two years prior to filing was overruled in the trial court. The Supreme Court of Washington reversed. It held that the three year trespass statute did not apply and that the two year statute did. It said the acts complained of did not constitute a trespass. It noted that the theory of the complaint was negligence. The court also noted that the original construction of the canal was lawful, if negligent. Therefore any damage to plaintiffs was an indirect consequence of a lawful act. The Court recognized that the distinction between direct and indirect injury was *not* the only test of trespass in these words:

> " . . . One of the [not the only] best tests by which to distinguish trespass is found in the answer to the question, when was the damage done? . . . " (35 Wash., p. 6) (quotation from the *Hicks* case)

Later in the opinion the Court made it very clear that it was holding that the three year trespass statute did not apply because (1) plaintiffs' own theory was negligence and (2) because the original construction of the canal by defendant was lawful. The Court said on these points:

> "Respondents argue in their brief that appellant's act was a forcible one, in that they assert it let the waters into the canal through the headgate, and that the injury to their lands was the immediate result of such forcible act. *It is asserted that the water was under appellant's absolute control from the time it entered into its canal from the Wenatchee river until it was let out at the end of the lateral. Such is, however, not the case alleged in the complaint. The complaint is based upon negligence in the construction of the canal,* and upon its insufficiency to carry the surplus water which accumulated, at the time mentioned, by drainage from above. If such were true, it is manifest that the water was not under the immediate and absolute control of appellant, as respondents now argue. The theory of the complaint is that the injury resulted from *negligent construction,* which occurred long before, and whereby appellant failed to properly handle the waste and surplus water. The act was remote from the injury. The latter was purely consequential, and not the direct or immediate result of the former. Moreover, if respondents' present argument were supported by the allegations and theory of the complaint, then, even though appellant had full control of the water, it still follows, from the reasoning in the cases cited above, that it was *not doing a thing unlawful in itself* when it permitted the water to run through its canal; and if, after runing through the canal, it was *negligently* permitted to escape, the appellant was liable for consequential damages recoverable at common law in an action on the case only, and not in an action

> of trespass. We therefore think that, under the *cause of action stated in the complaint*, our statute of limitations barred the action after two years. It follows that the court erred in overruling the demurrer to the complaint." (35 Wash. pp. 8-9; emphasis supplied.)

This extract emphasizes that the theory of the complaint is vital. Only if petitioners' theory in the cases at bar was negligence, which it clearly was not, can the *Suter* opinion be in point.

As noted above, the trial Court, in refusing to apply the three year trespass statute to the present cases, relied on the *Weller* and *Riblet* cases in addition to the *Suter* case. Not only was the *Weller* case pleaded in nuisance; there was no discussion in the Court's opinion in that case of either the substantive law of trespass or of limitations as to trespass. In the *Riblet* opinion there was clear recognition that appellant's theory below was nuisance. Appellant nevertheless, in a nuisance case, tried to convince the Court that the three year trespass limitation was properly applicable. This the Court quite correctly rejected (at p. 258 of 41 Wn. (2d) ).

As we have seen, the *Suter* opinion refused to apply the three year trespass statute because the theory of the complaint was negligence *and* because the original building of the canal was not unlawful in itself. We submit that the theory of the present complaints is trespass and that it is not lawful in Washington or anywhere else to deposit solids on another's real property.

As to the theory of the complaints, Judge Fee, as noted above, ruled in *Arvidson* in 1952, long before trial,

that the complaint stated a cause of action in trespass. The opinion is reported at 107 F. Supp. 51 (App. A, Part III) and the holding to that effect is in the first paragraph of the opinion. Because the complaint stated a cause of action in trespass, Judge Fee held that the action could not be transferred to Oregon. It could not be removed to Oregon because the Oregon Supreme Court had held Oregon Courts had no jurisdiction over *foreign* trespasses upon real properties. 107 F. Supp. 51, 52; App. A, Part III.

The trial Judge was of opinion that this ruling was not a ruling on Washington law (I-96; App. A, Part I, p. 89). On the contrary, it seems clear to us that it was necessarily a ruling on Washington law. The complaint alleged that the Arvidson farms were in Washington and that appellee had deposited solids on them. (In this respect the Whiteaker complaint is identical.) If that had not been a Washington trespass, Judge Fee would have been free to order the action to Oregon or at least the Oregon cases dealing with foreign trespass would have been inapplicable, and the whole basis of Judge Fee's opinion summarized in the preceding paragraph pointless. Though Judge Fee's opinion probably became the law of the case, it is enough to point out in what follows that he was right. This brings us to the Washington trespass cases.

The *Suter* case was decided in 1904. In 1909 the Washington Supreme Court not only held that the Washington law of trespass accords with the common law, but defined what it was at common law. In *Welch*

*v. Seattle & Montana R. Co.*, 56 Wash. 97, 105 Pac. 166 at pp. 99-100 of 56 Wash., the following appears:

> "It is the established rule of *this court* that the question of *whether an action is an action for trespass upon real property depends upon what was deemed trespass at the common law,* and in order to determine that question it is necessary to examine the common law authorities. In 2 Cooley's Blackstone (4th ed.), page 208, the author says that, 'Trespass in its largest and most extensive sense, signifies any transgression or offence against the law of nature, or society, or of the country in which we live; whether it relates to a man's person, or his property.' But that 'in the limited and confined sense in which we are at present to consider it, it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property.' The essential idea seems to have been the breaking of a close by force, the words of a writ of trespass commanding the defendants to show cause *quare clausum querentis fregit;* and it was frequently called trespass *vi et armis. So great a regard did the law have for a man's close or premises that it presumed damages would accrue from the breaking into or penetrating such close,* even if it was no more than the trampling of the herbage therein. An action setting forth such facts as these was an action in trespass, as distinguished from what was designated an action on the case, where the injury resulting from the action was not caused by direct force, but was consequential or an injury resulting indirectly from the act complained of. Mr. Blackstone, on page 123 of Book 3 (Lewis' ed.), makes a distinction as follows:
>
> " 'And it is a settled distinction, that where an act is done which is in itself an *immediate* injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis;* but where there is no act done, but only a culpable

omission, or where the act is not immediately injurious, but only by *consequence* and collaterally, there no action of trespass *vi et armis* will lie, but an action on the special case, as the damages consequent on such omission or act.' " (emphasis supplied).

The important principle involved in the foregoing extract is that damages are presumed from the breaking of the close. In other words, if defendant breaks the close, liability is absolute, damage or no damage.

This principle was dicta in the *Welch* case because the Court held there was no physical invasion. 56 Wash. 97, 101, 2. The dicta were applied later, however, in *Gray v. Harris & Son,* 200 Wash. 181, 93 P. (2d) 385. There, on one cause of action, plaintiff had been awarded $100 because defendant had hauled some timber over an old road on plaintiff's real property. The Washington Supreme Court's views were these:

"(4) Appellant contends that the trial court should in no event have allowed more than nominal damages to respondents on their second cause of action.

"There is no question but that appellant was a trespasser upon respondents' land, after redemption. The testimony shows that it hauled over this land at least 600,000 board feet of timber, after respondents had redeemed, and before this action was begun, without respondents' permission, and without any right so to do. However, the testimony also shows that the hauling was upon an old road that had been there for some ten years, and that the only damage was such as might result from the use of this private road. The only testimony bearing upon the damage to the land from such hauling seems to be based upon the claimed reasonable value per thousand feet for hauling timber over this road. We

> are of the opinion that there is no testimony herein which would justify a judgment against appellant on the second cause of action in the sum of one hundred dollars, but a technical trespass having been proven, we think respondents are entitled to nominal damages in the sum of one dollar, on their second cause of action." (200 Wash. 181, 188-9.)

Obviously this extract is susceptible only of the meaning that upon proof that the close was broken the liability is absolute without any proof of actual damages.

*Clark Lloyd Lum. Co. v. Puget Sound & C. R. Co.*, 92 Wash. 601, 159 Pac. 774, also dealt with trespass. There the railroad wanted to lay some track along the lumber company's property and the parties entered into an agreement to that effect. In disregard of the rights conferred, the railroad blasted some stumps and threw some debris into a cove where the lumber company maintained some booms. The question presented was whether those acts constituted a trespass for the purpose of the statute of limitations. The Court held that they did. It said:

> " . . . The blasting of the stumps and the waste of the debris over the bank and into the cove was an immediate injury. *The damages which may result do not have to be immediate to sustain an action under Sec. 159.* The statute does not concern itself *with the moment of time when the damage actually accrues, or the amount of the damage.* They may continue and grow in volume. It concerns itself only with the character of the trespass. *If a thing lawful to be done results in damage, the case falls under the two-year statute. If the thing done is wrongful in its inception to the extent that it presently invades a property right, the three year statute applies . . .*" (92 Wash. at p. 605; emphasis supplied.)

This extract is irreconcilable with the trial Court's decision and supports our view that depositing solids presently invades a property right whenever the damage was done, and regardless of the amount thereof.

The common law of trespass has been defined elsewhere exactly as it has been defined in Washington. I Restatement of the Law of Torts, Sec. 158 at p. 359 defines trespass at common law as follows:

> "One who intentionally and without a consensual or other privilege
>
> (a) Enters land in possession of another or any part thereof or *causes a thing* or third person so to do * * * is liable as a trespasser to the other irrespective of whether harm is thereby caused. * * * "

Under the comment on clause (a) at page 362 appears the following:

> *"n. Causing Entry of a Thing.* The actor without himself entering the land may invade another's interest in its exclusive possession by throwing, propelling or placing a thing either on or beneath the surface of the land or through the air space above it. Thus, in the absence of the possessor's consent or other privilege so to do, it is an actionable trespass to throw rubbish on another's land, even though he himself uses it as a dump heap, or to fire projectiles or to fly an advertising kite or balloon through the air above it, even though no harm is done to the land or to the possessor's enjoyment of it. *In order that there may be a trespass under the rule stated in this Section, it is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done which will to a substantial certainty result in the entry of the foreign matter.* Thus, one who close to another's boundary so piles sand that by force

> of gravity alone it slides down onto his neighbor's land or who so builds an embankment that during ordinary rainfalls the dirt from it is washed upon adjacent lands becomes thereby a trespasser on the other's land." (Emphasis supplied.)

The Oregon District Court through Judge Fee has had occasion recently to consider the application of the common law of trespass to a particular fact situation. *Ure v. United States,* 93 F. Supp. 779, aff'd *sub nom White v. U. S.,* (CA9) 193 F. (2d) 505. That case involved one group of plaintiffs who sought to prove liability on the theory of negligence for failure of defendant to deliver irrigation water to their crops and another group who sought to prove strict liability on the theory of trespass when their lands were flooded by the breaking of an irrigation canal. Concerning the failure to deliver water, the Court held that no negligence had been proved. Concerning the flooding cases, the Court held that trespass involving strict liability was involved. The Court did so in the following language:

> " . . . When one voluntarily and deliberately does an act upon his own land which results in a physical trespass upon lands in other ownership, the liability is absolute . . . " (p. 787 of 93 F. Supp.)

On May 4, 1950, plaintiffs closed their cases before Judge Fee, sitting in Oregon, in *Kerr, et al.,* and *McCallister, et al. v. Reynolds Metals Company.* These were damage actions against the Troutdale plant. Defendant in that case was represented by the same law firm as represents respondent here. Some plaintiffs were residents of Oregon but some were residents of *Washington* so that Washington law applied to them as it does here.

Defendant moved for and argued a motion for an involuntary non-suit under R. 41-B, F.R.C.P. The Court denied the motion and said:

> "Then I think that there is some evidence in this case from which the Court could deduce or infer very properly that there were particles developed in the pots at Reynolds Metals Company that were transferred physically onto the properties of the plaintiffs. As to whether they caused damage or not would then not be a question, because by mere physical invasion plaintiffs have established their case.
>
> * * * *
>
> " * * * The Court is of the necessity of giving at least nominal damages for the trespass which I think up to this point has probably been established, and from there on determine how many of these claims are valid." (Tr. in *Kerr* and *McCallister*, 846.)

87 C.J.S., Trespass, Sec. 13, is in accord with the Restatement trespass rule. It reads:

> "Every unauthorized entry is a trespass, regardless of the degree of force used, even if no damage is done or the injury is slight and gives rise to a cause of action for nominal damages at least . . . " (Sec. 13(b) pp. 965-6, citing *Welch v. Seattle & Montana R. Co.*, 56 Wash. 97, 105 P. 166, discussed supra.)
>
> "Entry by Thing Controlled by Defendant. The entry need not be in person but may be by the projection of force beyond the boundary of the land where the projecting instrument is employed. Thus, the trespass may be committed by casting earth, or other substances, upon another's land . . ." (Sec. 13(c), pp. 966-7, citing *Ure v. United States*, 93 F. Supp. 779, discussed supra).

To the same effect is 52 Am. Jur., Trespass, Sec. 12, page 844:

> "At common law every man's land was deemed to be inclosed, so that every unwarrantable entry on such land necessarily carried with it some damage for which the trespasser was liable. Any entry on land in the peaceable possession of another is deemed a trespass, without regard to the amount of force used, and neither the form of the instrumentality by which the close is broken nor the extent of the damages is material. . . ."

Thus the Washington cases, the standard texts and Judge Fee are in accord as to what constitutes trespass at common law. Accordingly, it was error for the trial Court to rule that the complaints did not state Washington causes of action for trespass. And it was error for the Court of Appeals to affirm. The effect of these rulings, of course, was to deny petitioners the opportunity to prove such damages as they suffered in the third year ruled outside the statute.

After the trial Court's erroneous ruling on the complaints, the cases went to trial and, as we shall now show, the uncontradicted evidence was that solids were in fact deposited on petitioners' lands within the two-year period held applicable and up to the time of trial. Therefore this Court upon remand ought to direct the trial Court (1) that a trespass was made out in the two-year period for which proof was received; and (2) to permit proof of such damages as may have been suffered in the missing third year.

Whether solids were deposited was a problem which led the trial Court into contradictory results. First, as

noted above (p. 10), the trial Court in its opinion said: ". . . In all probability some areas in the near vicinity of the plants receive deposits of particulates or solids in a minute and powdery form . . ." Then the trial Court in its opinion said:

> ". . . Even though it were assumed that solids in the form of minute particulates from defendant's plants have been deposited on plaintiffs' lands, the injury, if any, resulting therefrom was consequential, the action is on the case, and awards of nominal damages would not be justified by the facts or required by the law." (I-100; App. A, Part I, p. 92).

Of course, this legal conclusion that the deposit of solids on Washington lands does not constitute a trespass made it unnecessary for the Court to make any finding whether or not solids were deposited. Nevertheless, the Court entered erroneous findings that it could not determine how much, if any, fluorides were deposited (I-102-D; I-208-B). In what follows we want to point out that the Court's assumption that solids were deposited was right and its findings were wrong so that this Court should on remand direct the trial Court to find the fact that solids were deposited and to conclude that such deposit constituted a trespass.

Mr. Zeh, respondent's chief chemist, as an adverse witness, said that at both the Troutdale and Longview plants 5 to 6 pounds of fluorides were consumed for every 100 pounds of aluminum produced (erroneously reported as "per ton") (III-32). He further testified that hydrogen fluoride and cryolite were the principal fluorides escaping (III-33) from the plants and that 90%

of them are *solids* (III-34). As to the amounts of escaping fluorine, the figures are 750 pounds a day at Troutdale (III-98) and 250 per day at Longview before expansion of capacity from 60,000,000 to 100,000,000 pounds per year (III-71) and no less than 450 per day thereafter (VII-1673, 1614).

Mr. Zeh said that respondent started testing vegetation in 1946 and air in 1949 around both plants in order to determine how much fluorine was getting out and where it went (III-37). Both plants have fume control systems (III-33) and, generally speaking, the fluorine in the samples declined as the controls were installed at both plants (III-41). He then said that normal vegetation contains 20-25 parts per million (ppm) fluorine (III-42). Results above that range indicated to him airborne fluorides (III-73), because he had tested various materials outside of contaminated areas (III-73). Respondent's forage testing results near the Whiteaker place in the last fourth months of 1952 averaged well over Mr. Zeh's "normal" figure of 25 ppm (III-44, I-160). Those results were also well over normal for the same four months in the three or four years prior to 1952 (I-158-160), as well as in the spring of 1953 (I-161). Asked whether the increased fluorides were associated with the increased capacity at Longview (from 60,000,000 to 100,000,000 pounds per year) which took place August 1952, he said that "good common sense" so indicated (III-47).

Respondent for some time had maintained a testing station near, but not on the Rawnsley, Josephson and Goldsmith places. Had the results been obtained on

those farms instead of on the station, Mr. Zeh thought the results would have been comparable (III-66). Those results for the summer of 1953 were at or above the witness' "normal" figure of 20-25 ppm (I-172), and Mr. Zeh eliminated the possibility of a non-Reynolds source when he said, ". . . there are no other large users of fluorine in there" (III-60).

As to Troutdale, respondent maintained 13 stations on the Washington side of the Columbia. Had the results obtained been obtained on petitioners' farms instead of on the stations, the results would have been comparable (III-79). Later Mr. Zeh explained that the testing stations had been agreed upon for the trial because they bracketed the farms and that the station results obtained were comparable to results that would have been obtained on the farms if the distances between the two were reasonable (III-122). Similarly to his Longview testimony, Mr. Zeh eliminated any non-Reynolds source of fluorides at Troutdale by testifying that the only other source there was a small sawmill (III-76). Concerning the results obtained by respondent on its 13 stations (I-58-63), Mr. Zeh agreed that in 1948 and 1949 all stations were over his "normal" of 20-25 ppm at some time of the year; that all except one station was in 1950; all except four were in 1951; all except one was in 1952 (III-80); but that only six of the 13 were in 1953 (III-81). He didn't know why the 1952 results were higher generally than those in either 1951 or 1953; but he saw no great difference statistically (III-81).

On respondent's testing results and on the admissions of this one adverse witness, it is perfectly clear that respondent is a substantial user of fluorides at its Longview and Troutdale plants; that fluorides do escape from those plants; that 90% of the escaping fluorides are in *solid* form; and that more than "normal" amounts of fluorine in *solid* form regularly year by year up to the time of trial had been deposited on petitioners' farms. If the Court will carefully consider the references to Volume I of the transcript noted in the three preceding paragraphs, it will be apparent that as a matter of mathematics respondent was depositing *solids*. Thus, for example, respondent took eight samples near the Whiteaker farm in the fall of 1952 beginning in September. The results ranged from 26 to 60 ppm (I-160). Subtracting Mr. Zeh's 20-25 ppm as "normal" and applying his 90% particulates to the balance, the result establishes solids on the testing stations.

That solids arrived on the farms does not depend upon mathematics. There was direct and uncontradicted testimony on the subject. Dr. William E. Caldwell, a witness for petitioners, is a chemist who was trained in meteorology (IV-441). He had visited the plants and explained that when the fluorides leave the plants they travel with the wind currents. The cloud containing the fluorides spreads 20% of the distance traveled (IV-444) and rises and falls 10% of the distance traveled (IV-445). The size of the escaping solids at the two plants is sub-micron to 10 microns. At these sizes and assuming that 90% of what escapes is in solid form and that the wind blows 4-6 miles per hour, the solids would travel

with the air stream and adhere to the ground proportionately to the square of the distance from the plants (IV-448). Dr. Caldwell had previously (IV-446) testified as to average wind speeds. He concluded by saying that at two miles from the plants one-half pound per acre of fluorine would be deposited annually. At four miles the deposit would be two to three-tenths pounds per acre per year and at eight miles one-tenth pound per acre per year (IV-464-5). These fluorides, he said, would be in the form of *cryolite particulates, sodium fluoride and mist particles* (IV-465).

It will be noticed that the amounts mentioned by Dr. Caldwell are measures of *solids*. These amounts were elicited on cross-examination. The testimony was:

"Q. Assuming the conditions as they exist and existed at Longview when you made your visits there, how much fluorine in the form of fluorides would accumulate about two and one-half miles from the plant measuring it on an acre basis over a period of one year, if you know?

A. Are you asking if I have an opinion of the amount?

Q. Yes.

A. My answer to that is yes. Now are you asking for an estimated amount?

Q. That is right.

A. May I give background for my estimate?

Q. Well, you give me the answer; then you can give the background after.

A. My estimate is that there would be approximately a half pound per acre per year at about two miles from the plant.

Q. And what would it be at four miles?

A. It would be less at four miles, not taking square roots.

Q. An eighth of a pound, would you say? Double the distance?

A. Not taking square root mentally I would say it would be three tenths or two tenths per pound.

Q. What would you say about eight miles?

A. Progressively less with distance.

Q. Well, what would you estimate it to be?

A. I am not here taking square roots and carrying this out exactly on an arithmetical basis. I would estimate somewhere of one tenth of a pound.

Q. Per acre at eight miles?

A. Yes.

Q. What would that be, in what form, particulates?

A. It would probably be some cryolite particulates, sodium fluoride, gaseous HF which would have then been absorbed into the form of droplets, mist particles.

Q. That is eight miles away?

A. Yes." (IV-464-5)

The real properties of all petitioners in both cases are well within eight miles. Despite this and the further fact that the trial Court obviously believed this uncontradicted testimony (App. A, Part I, p. 84), it nevertheless entered findings that it couldn't tell how much fluorides, if any, were deposited (I-102-D; I-208-B).

The following review of other experts' testimony (all on behalf of petitioners) concerning the deposit of fluorides is to some extent cumulative. Its importance additionally, however, is (a) three independent experts gave their opinions that respondent was the source of the fluorides and, (b) the same experts thought that 10-15 ppm was "normal" on pasture grasses. It will be recalled that Mr. Zeh, an interested employee of respondent, said 20-25 ppm.

Dr. Allmendinger is in charge of the Western Washington Experiment Station at Puyallup, Washington. He has worked on the fluorine problem since 1943 (III-127). In his opinion anything over 15 ppm fluorine on pasture grasses or gladioli represents airborne fluorides (III-142-143). His figure was 10-15 ppm on prunes. When the Troutdale plant was closed from September 1945 - September 1946, he obtained results on prunes in the summer of 1946 down to 17 ppm, while in July and August 1945 the results were 150 and 119 ppm (III-156). In 1947 the prune samples were up again to over 300 ppm (III-156). The course of his Troutdale area testing thereafter is shown by this testimony:

> "Following down through the analyses we get considerably, or I should say quite high samples during 1947 and 1948 and there is one sample 178 during 1949, but all of the samples taken there are much above that which would naturally occur in 1951 and 1952.
>
> Q. Let me interrupt you for a moment if I may, Doctor. It is also an agreed fact in the Arvidson case as of the fall of 1950 Reynolds installed a new control system to begin operating at that time which increased the efficiency of its fluoride collection devices from the pre-existing about 62% effective to approximately 90. With that fact in mind would you proceed?
>
> A. Well, beginning in 1951 the average of the results would be somewhat lower during 1951 and 1952 than the two samples taken in 1953. They also show somewhat lower, but still above what you would expect to occur without contamination." (III-156-7)

With respect to the agreed fact that the Longview plant was also closed for a period of time, Dr. Allmendinger was questioned and responded as follows:

"Now it is an agreed fact in this case that the Longview plant was closed between the spring of 1947 and the spring of 1948. With reference to that agreed fact would you please interpret the prune leaf results shown on this page?

A. The best place to show that is in this location marked '25th & Beech.'

Q. Where is 25th & Beech?

A. It is on the northwest side of Longview, I believe, oh approximately a couple of miles, I would say, from the aluminum plant. The fluorine analysis of these prune leaves as you will note for 1945, the two records taken there 404, 419, show considerable fluorine in the air. In fact, those are rather high readings. 7/25/46 we got a reading of 208. Then in June and September 1947 the readings were quite low. Reading in 1948 again the first reading in June is moderate and then the fluorine content increases. Through each of the following years we have picked up considerably high readings and you will notice, generally speaking, there is a trend for fluorine content of the foliage to increase from early in the spring to the fall. This is not uniform as perhaps you will get a low sample or high sample, but generally speaking there is a tendency for the fluorine to increase as the season advances in foliage.

Q. What do you conclude from that fact?

A. Well, it appeared that the, since the fluorine content was reduced during the period that the plant was out of operation and immediately started to rise again after the plant came into operation, that Reynolds was the source of the contamination involved.

Q. That is your opinion?

A. That is my opinion." (III-167-8)

Mr. Miller, a chemist and an associate of Dr. Allmendinger, did all the fluorine analyses on the project (V-209). He has also been engaged in the fluorine problem for nearly 10 years (III-210). In his view normal

forage should contain not over 10 ppm fluorine and neither should gladioli (III-215-216). As to prunes, his level is 15 ppm (III-216). He agreed with Dr. Allmendinger that the extreme variation in the fluorine content of prunes between the times when the two plants were open (III-217-8) and when they were closed as shown by Exhibits 20 and 520 was attributable to respondent's operations (III-219).

Dr. Compton's experience with airborne fluorides was similar to Dr. Allmendinger's. He had been working on the problem since 1948 (V-998). He has worked with pasture grasses, buckwheat, gladioli and has tested air for fluorine content. As he spoke he was conducting an experiment on Sauvies Island, Oregon. His control (i.e., in a non-fluorine area) stations for that experiment at Dayton, Newberg and Corvallis, Oregon show for grasses, 2 to 4.7 ppm. On his air sampling at the Troutdale airport he got a fraction of a part per billion fluorine (V-1015), while he never got any at Corvallis (V-1051). Over 10 ppm on pasture grasses indicated to him airborne fluorides (V- 1013).

Respondent's most recent results on the testing stations nearest the Whiteaker place as shown by pp. 13-14 of the Pre-Trial Order (I-157-161) indicated airborne fluorides to Dr. Compton as did also the 1951-53 results obtained by the Western Washington Experiment Station on the Whiteaker place (I-163-164). As to the results obtained by respondent near, but not on the Rawnsley, Josephson and Whiteaker places (I-169-172), Dr. Compton testified as follows:

"A. For 1948 on page 18 there seems to have been quite a lot of fluorine there throughout the sampling season, and in my opinion looks like it would probably be airborne fluorine even though it it what you say, five miles away?

Q. About five miles east southeast of the Longview plant.

A. And the same thing would seem to apply in 1949 with the exception of that sampling on August 23rd, and in 1950 there are, starting on March 17th, values running above 10; 11 parts per million on May 19th is borderline, and I wouldn't say one way or the other whether that was airborne or not, but the others would indicate that possibly there is a little airborne fluorine in the area, at least as indicated by those samples up to the sampling of August 17th. From then on the values are about like our normals or controls indicating no, in my opinion, no atmospheric fluorine contamination from March 17th on through the sampling season.

Q. Take a look at the next page, please.

A. Well, the values run from about 3.2 parts per million up to about 41 parts per million, and only those values of 10 or above that I have any suspicion of, and I see two twelves and I wouldn't put too much weight on these because these, I assume, are single values.

Q. You may so assume. It is a single sample.

A. Yes. So the atmospheric fluoride contamination in my opinion was pretty low during that particular season at that farm except on the 18th of August (I-171) when it went up to 41 parts per million.

Q. All right. Now as to 1952, if you will?

A. Well, there are two or three high values there. One, 106 on the 20th and 21st of August and another value of 37 on July 22nd, and a number of, well 10 and some twelves. In general there was atmospheric fluoric contamination it looks like in 1952 with the exception of those times when the values were 10 or below. Again I would not place too much

importance on values running 11 and 12 because they are borderline. As I have indicated right along, they are on the borderline and again these are single values.

Q. How about 1953?

A. In 1953 the values running from 29 down to 9.5; all fairly low in my opinion. I wouldn't say there is any atmospheric contamination on first sampling which was January 28th or 29th it would indicate, nor would I be very much concerned about the samplings, the sample taken on April 29th. The others indicate there is possibly some atmospheric fluoride contamination in the area, but not too much.

Q. What would you say about the period—what would you say about the last three samples standing alone?

A. Well, they are considerably higher than any of the others or the average of the others for that season indicating a little greater atmospheric contamination for those three samplings." (V-1022-24)

Dr. Compton's views with respect to respondent's 13 testing stations bracketing the Arvidson petitioners' farms are as follows:

"Q. Have you got the Arvidson pretrial order?

A. Yes.

Q. Doctor, will you take a look at page 28 and 29. Those are agreed on figures, Doctor, and they represent a sampling of forage grasses done by Reynolds, and it is agreed that the results set forth on those two pages for the years 1948—I am sorry, it is three pages, and ending on page 30 (I-58-63). It is agreed that those results on pasture grasses upon analysis by Reynolds did contain those many parts per million. Is there anything that you want to add to the generalizations you made on the figures in the other pretrial order after looking over this bunch of figures in the Arvidson order?

A. Well, let's take it by years. The samples taken in 1948 are usually, well, with about two exceptions that I see now are all about 10 parts per million, a few elevens, but some of the values go up in the sixties and so on. For that year for those particular station samples it looks like there has been rather an appreciable amount of contamination of that pasture.

Q. I might say, as you probably already figured out Doctor, the numbers at the top of the bunch of figures indicate different testing stations.

A. Yes. I understand that, listed up above; I see. In 1949 there are a number more stations of 10 or less, but in general there has been rather appreciable atmospheric contamination as indicated by these figures for it looks like all of those stations for the months of the season that was sampled with the exception, of course, of those values running 10 or less.

Considerably less contamination in 1950 as indicated by a rather large number of values below 10. There were times when there was rather appreciable amount at some stations during that year, but by and large the contamination was very much reduced from what it was in the previous two years.

In 1951 the values are even lower it seems like than they were in 1950, although that might not be upon a little longer examination.

The last three years it looks like contamination has been materially reduced over what it was the previous two years.

Q. I wonder if I could direct your attention to 1952, Doctor, as compared to 1951 and 1953?

A. 1952 vs. the other two. Well, there seem to be more high values, values above 10 for the latter part of 1952 than there were in 1951, and especially so at some stations. In 1953 most of the values, it looks like, are 10 or below indicating that the contamination that year was even less than it was in 1952 and possibly even in 1951. I can't tell by glancing at a sheet like this." (V-1031-33)

Mr. Zeh had testified that he averaged the fluorine results he obtained (III-58). In response to some questions by the Court, Dr. Compton had some interesting things to say about averages and also the effect of the winds upon the deposition of fluorides. The colloquy deals with the figures at the top half of p. 22, Whiteaker Pre-Trial Order (I-177-8) and was as follows:

"THE WITNESS: Well, in 1951 the average is 15.8. That would indicate for the season as a whole there has been atmospheric fluoric contamination, and the same thing would apply to 1952 for the season as a whole.

THE COURT: But only by a very small margin?

THE WITNESS: That is right, that is right, very small margin, to be sure, and of course we always have to look at what makes up an average, and in 1952 the range is from sixty-six down to two, quite a wide spread.

THE COURT: That is the biggest spread of any of those?

THE WITNESS: Yes it is. It would be dangerous, I think, to use averages. They mask the variation that we find within the season and that is always true. If we can say this average plus or minus value, that would give us some idea of the range we are working with, but when we get an average like this nineteen and you can very well see it makes quite a difference. It doesn't even approach sixty-six nor does it approach two, so that average I would think in my opinion is very misleading. It doesn't show the picture at all.

THE COURT: One other question I have in mind and that is apparently—I don't want to anticipate, maybe you are getting to this, but I'd like to while it is in my mind.

MR. CRONAN: Very well.

THE COURT: Apparently the fluorine concentration must dissipate very rapidly or, in view of the

fact that monthly, one month you have got sixty-six and the next month you have got 2. Does—is it a logical inference to draw from that that you, that the contamination disappears very rapidly or may disappear very rapidly?

THE WITNESS: Well, the contamination at the source may vary, yes, and that will vary due to wind movement. But maybe what you are getting at is what happens in the grass itself, is that it?

THE COURT: Yes, I'd like you to give me an explanation of how it comes about that you may have for example, for a period of two or three samplings you will have quite high readings and then all of a sudden you will run into period when there will be very low readings. Now the—one would—the lay person would assume from that that the contamination rather quickly dissipates or disappears.

THE WITNESS: That is exactly right. It will depend on wind movement. If it is a steady wind for a long period of time from certain definite direction blowing on that farm from the source, we could expect high values. If there are periods of calm or periods when the wind has shifted in the opposite direction, then the contamination would probably be reduced to zero." (V-1028-29)

We believe the above summary of the evidence clearly shows that respondent in both cases was continuously and repeatedly depositing solids on petitioners' properties during the periods for which proof was received.

We turn now to the personal property claims. In its rulings before trial on the limitations point (this Petition, pp. 10-11) the trial Court included rulings and orders that a Washington two-year statute applied to the personalty claims and not a three-year statute (I-12, 138). A similar ruling was made after trial (I-97; App.

A, Part I, p. 91) and appropriate Conclusions of Law entered. The three-year statute reads:

> "Within three years:
> * * *
> "2. An action for taking, detaining or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated; * * *" (R.C.W. 4.16.080(2) )

The two year statute (R.C.W. 4.16.130) reads:

> "An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

In its written decision the trial Court said it was "fully satisfied" (I-97; App. A, Part I, p. 89) the two year statute applied. That conclusion was "inescapable" to the trial Court (I-97; App. A, Part I, p. 90), under six cases which it cited, but did not analyze. The six cases are: *Northern Grain & Warehouse Co. v. Holst,* 95 Wash. 312, 163 Pac. 775; *Clark Lloyd Lbr. Co. v. Puget Sound & Cascade Ry. Co.,* 92 Wash. 601, 159 Pac. 774; *Irwin v. J. K. Lumber Co.,* 119 Wash. 158, 205 Pac. 424; *Constable v. John P. Duke,* 144 Wash. 263, 257 Pac. 637; *Noble v. Martin,* 191 Wash. 38, 70 P. (2d) 1064 and *Luellen v. Aberdeen,* 20 Wn. (2d) 594, 148 P. (2d) 849.

We shall now analyze the cases cited by the Court. In so doing it is necessary to have in mind that the Washington limitations statutes are unique at least in one respect. Most codes have a residuary or "catch-all" statute providing a period of limitations for actions not otherwise dealt with. The Washington two year statute

above quoted is such a statute. However, the last clause of the above quoted Washington three year statute dealing with personalty, is also a "catch-all".

The Washington three year statute has seven subdivisions. As we have seen, the first one deals only with waste or trespass upon real property. The first two clauses of the second (as quoted above) deal with *any injury to personal property;* and the last clause deals with ". . . any *other* injury to the person or rights of another not hereinafter enumerated, . . ." The remaining five subdivisions of the three year statute deal with specific types of injuries to "the person or rights". The Washington Legislature should have foreseen that when a "person or rights" case arose which was not mentioned in one of the five subdivisions of the three year statute after R.C.W. 4.16.080(2), a contention would be made that the last clause of 4.16.080(2) applied instead of the regular "catch-all" two year statute (R.C.W. 4.16.130). Indeed, unless some limiting language be read into the last clause of R.C.W. 4.16.080(2), it is impossible to read it with R.C.W. 4.16.130. The precise problem arose in *Northern Grain & Warehouse Co. v. Holst,* 95 Wash. 312, 163 Pac. 775, the first case cited by the trial Court (I-98; App. A, Part I, p. 90) in support of its conclusion that the two year statute applied. In that case Holst, a grain inspector, neglected to get a bond from a warehouseman so that Northern Grain could not collect from the warehouse man when he defaulted. The Washington Supreme Court solved the problem created by the Legislature by first deciding that the claim against Holst was *indirect,* the direct fault being that of the warehouseman

in defaulting. Then the Court went on to hold that where a claim is made of injury to "the person or rights" *not* covered by the five subdivisions of R.C.W. 4.16.080 after the second subdivision, the injury must be direct to fall within the last clause of 4.16.080(2); if indirect, the claim was limited by the two year provision of 4.16.130. Only that way, said the Court, could the two statutes be read together (95 Wash. 312, 315).

An example of a direct injury within the meaning of the last clause of 4.16.080(2) is *Luellen v. Aberdeen,* 20 Wn. (2d) 594, 148 P. (2d) 849, cited by the trial Court in support of the ruling below. There it was held that a police officer in a mandamus proceeding had suffered a "direct" invasion, so he got the benefit of the last clause.

We do not think either *Holst* or *Luellen* applies to the cases at bar. We are not claiming an injury to "the person or rights" not enumerated in any of the five subdivisions of 4.16.080 after subdivision 2 as in those cases. Instead, we claim that the *first* clause of 4.16.080(2) applies here, because of injury to "personal property". It could hardly be more in point.

Perhaps the trial Court applied the two year statute to the personalty claims as bar because, having decided that no trespass upon real property was made out because the injury, if any, was indirect rather than direct, it thought the same distinction applied to personalty. We are not sure of this for the Court gave no reason for applying 4.16.130 to personalty. In any event, we think nothing could be clearer than that appellants claimed in-

jury to their cattle, i.e., to their personal properties. Whether that injury be direct or indirect makes no difference because the first clause of 4.16.080(2) makes no such distinction. The distinction is a Court created one, but it was never applied by the Washington Supreme Court to personal property; that is to the first clause of 4.16.080 (2). It was created out of necessity (the *Holst* case) and was applied *only* to the last clause of 4.16.080(2); that is, to a "person or rights" case where the claim does *not* fall within one of the five subdivisions of 4.16.080 after 4.16.080(2).

*Irwin v. J. K. Lumber Co.*, 119 Wash. 158, 205 Pac. 424, cited by the trial Court, very clearly supports our position. That case involved an infringement of fishing rights. The Washington Supreme Court held the rights to be personal property and without further ado applied the predecessor of 4.16.080(2).

The trial Court also cited *Clark Lloyd Lumber Co. v. Puget Sound & Cascade Ry. Co.*, 92 Wash. 601, 159 Pac. 774; *Constable v. John P. Duke*, 144 Wash. 263, 257 Pac. 637, and *Noble v. Martin*, 191 Wash. 38, 70 P. (2d) 1064, in support of its two year personalty ruling. The *Clark Lloyd Lumber Co.* case deals with the definition of trespass upon real property and the applicable period of limitations. We quoted from the opinion in that case (Petition p. 18). It has nothing to do with the law of limitations as to personalty. The *Constable* and *Noble* cases are "person or rights" cases. Like the *Holst* case, they are claims not falling within the last five subdivisions of 4.16.080(2). Like *Holst* they involve

derelictions of duty and hence indirect injuries. Both do no more than follow the *Holst* case. We have already shown why we think *Holst* does not apply here.

The trial Court's rulings on personalty like its rulings on real property deprived petitioners of the benefit of the three year limitations statute.

We now wish to show by as brief a review of the evidence as possible that the petitioners' cattle were injured substantially in fact so that upon remand the amount of those damages may be fixed by the trial Court by direction of this Court.

For the purpose stated we shall start by showing this Court that a representative group of petitioners in each case owned cattle that respondent injured. We want to emphasize, however, that these claims are representative and that we are merely showing that the trial Court was clearly wrong in finding in each case and as to all claims that "Plaintiffs' cattle were not injured . . ." (I-102-D, 208-B). For the purpose of this showing we are not unmindful of Rule 52, F.R.C.P. providing in part " . . . Findings of fact shall not be set aside unless clearly erroneous . . . " Concerning this extract, this Court has recently said in *McAllister v. United States of America,* 348 U.S. 19, 20:

> " . . . a finding is clearly erroneous, when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' *United States v. Ore. Medical Society,* 343 U.S. 326, 339; *United States v. United States Gypsum Co.,* 333 U.S. 364, 395. . . ."

The representative group of claims we have mentioned takes the following form. There are 10 dairymen and three beef operators in *Arvidson* (Miller withdrew). Five of the dairymen are "Grade A" shippers of milk and five are "Grade C" or "factory milk" shippers. There are four "Grade A" shippers only in *Whiteaker*. Two clear elements of damage suffered by the dairymen are: (1) Physical abnormalities suffered by their cows; and (2) Loss of milk production. (We do not believe it necessary to deal here with the beef operators' somewhat different types of losses). Six *Arvidson* dairymen, three "Grade A" shippers and three "Grade C" shippers, and two *Whiteaker* dairymen appellants, both "Grade A" shippers have been selected for the purpose of what follows. We shall deal with their complaints by categories. These complaints of the eight farmers underlines the striking fact that the principal differences are ones of degree and not of kind. Moreover, as we point out below, particularly with regard to milk loss, *whatever the difficulties were, they were alleviated when the cows got away from fluorides and got worse as the fluorides increased.* Completing our review of the evidence, we shall show that there is nothing in the trial defense inconsistent with the " . . . conviction that a mistake has been committed. . . ."

### 1. *Short Lactations*

Mr. Rawnsley described a normal lactation in detail:

> "Q. Could you illustrate for the Court—that is, this document, now could you illustrate for the Court what a normal production curve for ten months looks like?

A. Well, a normal production curve as I see it, should go up within just a point, as a point of illustration, maybe five, six pounds of the peak the first 30 days and then possibly go to its peak the second 30 days, level off, maybe the same at 90 days, and then gradually start to drop very little for possibly two months, and then the curve would be gradual the balance of the curve. That would be normal.

Q. Gradually take the tapering off so that the curve is finished at 10 months, it that it?

A. That is right." (VI-1190)

Mr. Rawnsley produced charts he had constructed from his D.H.I.A. records on individual cows to illustrate that his herd did not perform in accordance with his definition of a normal lactation (VI-1182-1185).

Mr. Isbister corroborated Mr. Rawnsley. Mr. Isbister complained of low production. He attributed the low production to short lactations in the following language:

"Q. In speaking generally in the last four or five years, Mr. Isbister, would you say the milk production of your herd has been about what you expected or otherwise?

A. No, they don't seem to hold up like I would like them to.

Q. What do you mean by 'hold up'?

A. Well, they will milk good for two months and fall away and then milk good for six months and then fall away.

Q. How long does a cow ordinarily milk?

A. Well, I usually milk them about 10 months altogether.

Q. You found, however, that your cows had been drying up in anywheres from two to six months?

A. That is right.

Q. Has that been a condition that has been noticeable at any particular time, or what?

A. I didn't notice it until lately. Of course, when you sell milk you notice more than when you wasn't selling milk.
Q. Well now, what do you mean by lately?
A. Last several years.
Q. Last several years, did you say?
A. Yes." (IV-481)

Mr. Seekins also expressly complained of short lactations. He said his younger cows milk longer than the older ones and that they all hold up well for the first part of their lactations (IV-530). He said his trouble, concerning milk production was caused by short lactations rather than a low rate of production during normal lactations and he identified some short milkers by name (IV-565). Mr. Depoe said that the real reason he shipped cattle to the yards is that they weren't milking right (IV-593), and Mr. Stauffer said that his cows begin to drop off after milking about three months (IV-626).

2. *Low Production.*

As we have just seen, five of the eight farmers, in complaining of low production, specifically complained of short lactations. The other three did not specifically mention short lactations, but did complain of low production (*Whiteaker,* VI-1490; *Hester,* IV-373; *Baker,* IV-674). We relate below milk flow to fluorine intake.

3. *Stiffness and Lameness.*

All eight farmers complained of stiffness and lameness, the only difference being one of degree. Mrs. Rawnsley had operated the family dairy in Rose Valley long before respondent started operating at Longview

(VI-1142). In 1945 she first came in close contact with the cows again. She then noticed how stiff the cattle were and that they were hard to get on their feet (VI-1146). This had not happened at Rose Valley (VI-1147). Mr. Rawnsley also noticed the stiffness (VI-1192) which disappeared when the cattle were taken away during the flood (VI-1166). Mr. Whiteaker had some stiffness at Kalama, 10 miles from appellee's plant. Since the fall of 1948 the animals walk slowly and shift from one foot to the other in the barn. Since the fall of 1952 these conditions have gotten worse (VI-1490).

Mr. Hester had a lot of trouble with lameness at Washougal (IV-369) which got better when he moved to Aurora, Oregon (away from the Troutdale plant) (IV-372). Mr. Isbister had stiffness and soreness on the back of the front feet (IV-479) and he identified by name certain animals so affected (IV-496, 497). Three of Mr. Seekins' seven present animals show some stiffness (IV-528) and he noticed that the stiff animals are the last ones to come in for feed (IV-529). Mr. Depoe in 1950 had three animals in such bad shape that they would stagger into a clover field, lie down, and graze as far as they could reach (IV-584). The animals were also stiff in 1948 and 1949. Mr. Stauffer had some stiff and lame cows with puffed up feet (IV-627), as did Mr. Baker (IV-674).

4. *Scouring.*

Mr. Rawnsley reported serious scouring (diarrhea) conditions. He brought in some new cows in the fall of 1949. They made good records at first, but in 1950 they

scoured on pasture and on silage. When he took them off silage, they improved in three or four days (VI-1166). As to the herd generally, it scoured badly (50%) in October, 1952, and in June, 1953 (VI-1177, 1206-7). On the June, 1953, scouring, milk production dropped 25% (VI-1206-7). He gets the scouring in periods of heavy air from the direction of Reynolds and it stops with heavy rain (VI-1177). On cross-examination Mr. Rawnsley said, "not this type", when asked whether scours didn't often concern dairymen (VI-1224).

The worst scouring the Whiteakers had ever had was in October, 1952 (VI-1487). It hit half the herd, production went down about 20%, and it persisted till they had a heavy rain. They had had scouring before (VI-1496).

Mr. Isbister said the scouring he had encountered was different from ordinary spring scours because his cattle got thin and dropped off in milk (IV-480). Mr. Seekins had had scouring in the pasture season other than in the spring (IV-528).

5. *Excess Culling.*

This is so related to Mr. Ross' testimony as to what a normal cull should be that the subject is dealt with as a part of the analysis of the Ross testimony below.

6. *Miscellaneous.*

Some of the farmers said their cattle had trouble drinking cold water (*Rawnsley,* VI-1196; *Whiteaker,* VI-1466; *Depoe,* IV-586; *Stauffer,* IV-628; *Baker,* IV-675).

Mr. Rawnsley still has the problem, but he has cut it down considerably by heating the water about 10 degrees (VI-1196). Failure to shed winter coats was a prominent feature of the farmers' testimony too (*Rawnsley,* VI-1193; *Whiteaker,* VI-1487; *Hester,* IV-371; *Depoe,* IV-587-8). Messrs, Rawnsley and Hester reported that this condition improved when their cattle got away from fluorides (*Rawnsley,* VI-166; *Hester,* IV-372).

Mrs. Rawnsley reported that the cattle are smaller than they used to be (VI-1146). Her husband produced some weight slips (Ex. 600-D-1-A) to support his testimony (VI-1173) to the effect that his cattle were over 30% short in weight. He felt this was the most serious condition in the herd after 1950 (VI-1170). He showed a picture of a three-year old that he thought weighed only 55% of normal and was undersized (VI-1211). Mr. Whiteaker reported the same condition both as to weight and size and said the two-year olds are the worst (VI-1491-2). Mr. Hester's cattle didn't hold up in flesh while in Washougal (IV-369, 370) but they are all right in Aurora, Oregon (IV-372). The Isbister cows got thin (IV-480), as did Mr. Depoe's (IV-583, 587).

We now wish to show that the documentary evidence and the physical facts support the claims of lost production. In the *Whiteaker* case, the Rawnsley and Whiteaker D.H.I.A. herd books are before the Court respectively as Exhibits 600-C and 650-C. These books show production *actually attained*, fluorine or no fluorine. Experts, whose testimony is analyzed below, stated what the *production should have been under normal conditions.* The

Rawnsley testing year is December 1 to November 30th, and Whiteakers' is 5/1 - 4/30. With this background the following tables are self-explanatory.

Rawnsley

| Year Ending in | Normal Production | Actual Production | Loss per Cow | Cow Number | Actual Loss in Lbs. B.F. |
|---|---|---|---|---|---|
| 1948 | | 364.7 | | 42.3 | |
| 1949 | | 430.3 | | 38.67 | |
| 1950 | | 411.5 | | 37.76 | |
| 1951 | 430* | 374.8 | 55.2 | 29.92 | 1651.5 |
| 1952 | 467.5 | 381.1 | 86.4 | 30.58 | 2642.1 |
| 1953 | 485 | 354.2 | 130.8 | 38.08 | 4980.8 |
| | | | | TOTAL B.F. LOSS | 9274.5 |

Whiteaker

| Year Ending in | Normal Production | Actual Production | Loss per Cow | Cow Number | Actual Loss in Lbs. B.F. |
|---|---|---|---|---|---|
| 1946 | | 345.2 | | 21.41 | |
| 1947 | | 357.0 | | 27.1 | |
| 1948 | | 373.9 | | 28.2 | |
| 1949 | | 317.0 | | 28.56 | |
| 1950 | | 311.9 | | 31.42 | |
| 1951 | 400* | 307.0 | 93. | 43.54 | 4049.2 |
| 1952 | 400 | 335.7 | 64.3 | 51.42 | 3306.3 |
| 1953 | 400 | 303.5 | 96.5 | 56.33 | 5435.8 |
| | | | | TOTAL B.F. LOSS | 12791.3 |

The loss of butterfat for the three years based on the above tables is for Rawnsley about 9300 pounds and for

*The Rawnsley test year starts about the time of year that the complaint was filed, so the Rawnsley loss has been computed for the purpose of these tables to include the two years prior to filing; that is, starting 12/1/50. The loss is then continued through the year after the filing and up to trial. The Whiteakers' test year begins about six months prior to the filing date and their loss is figured beginning with their test year starting May 1, 1950. This is not quite accurate since the statute of limitations was held applicable prior to November, 1950. It is however, believed sufficiently accurate for purposes of this petition.

Whiteaker about 12,800 pounds. The milk vouchers for the two farms are before the Court (Exhibits 600-A, 650-A). They show that Rawnsley's actual butterfat sales ranged from $1.35 to $1.42 per pound within the period of limitations prior to filing, held applicable, and down to the start of the trial. Similarly, Whiteakers' price range was from $1.32 to $1.46.

We wish the Court to note, first, from the above tables, that, if one measures the Rawnsley-Whiteaker loss solely by the difference between what was actually produced in the highest years (Rawnsley, 1949, Whiteaker, 1948) and what they actually produced thereafter, in other words, even if one disregards the expert testimony completely, the loss is still considerable. Next, as detailed below (pp. 50-51), *those highest actual years are the years in which the herds got the least fuorine.*

As to the *Arvidson* case, Messrs. Hester, Stauffer and Baker are "Grade A" shippers, and Messrs. Isbister, Seekins and Depoe are "Grade C" or "factory milk" shippers. Milk slips and a record of the number of cows, butterfat produced and price received for all six of these petitioners are before the Court (the "A" and "C" series of exhibits as to each; see, for example, Hester—180-A, 180-C, I-222, II-vii). These documents show the amount of butterfat actually shipped each year within the period of limitations, prior to filing, held applicable, and down to the start of the trial. Based on the difference between what Mr. Ross (petitioners' cattle expert) said these cattle would produce under normal conditions and what they did produce, Mr. Hester has lost over 10,400 pounds

B.F. in a period when his actual sales produced between $1.01 and $1.29 per pound. Mr. Stauffer has lost over 8,200 pounds and his price range was $1.13 to $1.41. Mr. Baker's loss in pounds is over 17,600 and his price range was $1.11 to $1.41. Mr. Isbister lost nearly 2,900 pounds at prices between 66 cents and 91 cents. Mr. Seekins' poundage loss was over 2,500 and his price range was 70 cents to 95 cents. Mr. Depoe's shortage in pounds is nearly 7,000 at prices between 58 cents and 82 cents.

We pointed out above (p. 48) that in the fiscal year 12/1/48 - 11/30/49 the Rawnsley farm, as shown by the D.H.I.A. record book, produced 430 pounds B.F. on the average. Over six months before that year began, the herd stopped eating anything that could have been contaminated (VI-1167). Not until four months after that test year began did it consume home grown feed again (VI-1169). *Prior* to that year it consumed home grown feed and produced less and *after* that year it steadily declined (p. 48). The greatest *rate* of decline after the year 12/1/48 - 11/30/49 was in the year 12/1/52 - 11/30/53 (p. 48) and in that year respondent emitted 80% more fluorides than previously because it had expanded its production (VII-1673). This production performance is based on the physical facts alone, as shown by Mr. Rawnsley's testimony as to where the cattle were and what they ate.

The physical facts as to Whiteaker (p. 48) are that at Kalama, 10 miles from Reynolds, the herd average gradually increased from 345.2 butterfat for the year 5/1/45 - 4/30/46 to 357 butterfat for the year 5/1/46 - 4/1/47.

The *rate* of increase went up at Kalama in the next year ending 4/30/48 *when the Reynolds plant was closed* and was 373.9. Then the herd moved next door to Reynolds *and* the plant *reopened*. There was an immediate decline of over 15% to 317. Except for the year 5/1/51 - 4/30/52, the herd production has stayed about that level. The reason for the increase is clear. Mr. Whiteaker testified that starting in October, 1951, there was a substantial infusion of new blood in the herd (VI-1506, 7). When Reynolds increased its production in the fall of 1952, thereby emitting 80% more fluorides, there was a decrease of 10% to 303 for the year 5/1/52 - 4/30/53 though only one-half of that year was affected by the increased fluorides (August 1952 - April 1953). 303 was the lowest the herd ever produced.

As to the Camas-Washougal area, the Hester production performance also clearly shows the connection between fluoride intake and butterfat production. Mr. Hester testified how many cows he had at Washougal and Aurora and his milk vouchers at both places are before the Court. He was at Washougal from June 1947 to September 1951 (IV-338) and has since lived in Aurora (away from the Troutdale plant) (IV-337). Mr. Hester's winter roughage at Washougal the first two winters he was there was substantially all home grown (IV-380, 407); and it was substantially all Goldendale hay thereafter. Of course, he was away from fluorides after September, 1951. For the first two years (beginning in each case in December) at Washingal, Mr. Hester's average production was steady and bad; it was about

210 pounds B.F. For the year December 1949 - 1950 it was about 285; and for the next year it was nearly 325 with the last one-third of the year at Aurora. In April 1952 the herd was hit with Bangs disease (IV-340) and the age of the herd at the time of trial was four to five years. At Washougal it had been six to seven years. (Mr. Ross (V-780) and Mr. Rawnsley (VI-1186) defined the term "mature equivalent" to the effect that young cows' production is adjusted to allow for their immaturity.) Despite the change in age, the Hester's production has remained at about 325.

So far we have shown that petitioners' cattle were injured substantially (a) because the cows had something wrong with them in fact; and (b) because the cows were producing less than they should have. On these two subjects petitioners' experts testified corroborating petitioners. Let us review their testimony.

Dr. Keller was the regular veterinarian for the *Arvidson* petitioners from 1945 till he went into the Army in 1952. When he first got into the Camas area where the herds were, here's what he found:

> "I moved to Camas-Washougal area as I have stated in the fall of 1945. Shortly after that through my own observations of the animals, through the complaints of the farmers, their troubles and just living with it, in the area, running a general practice, we became aware that there was some problem, acute problem in the area.
>
> Q. What was the nature of the complaints you were told about?
>
> A. The complaints and observations were of such things as the animals for production, the ani-

mals not producing as the farmers stated the way they should, and buying better bulls all the time. Buy better cows yet can't produce any milk; their heat cycles, the animal did not come in heat after freshening, therefore they do not, are not able to keep up what they call Grade A basic milking production as they should.

Q. Will you explain that a little?

A. Dairymen in selling milk is not just paid for all his milk at one price. He has what we call a basic. In other words, that is a minimum amount of milk he produces usually ascertained as to the minimum two months of any year. That is his basic and that is the way it is ascertained. In other words, what they are trying to get at is for a dairyman not to produce milk during the lush grass months, but rather keep a constant milking for the year around. Therefore, he gets a much higher price for what we call the basic amount of butterfat that he has and the rest of his milk goes for what we call a surplus or a price much less than his basic. Therefore, it is advantageous for him to have his cattle freshening at regular intervals the year around to keep up a constant and even milk flow. It benefits him very much financially.

Q. Go ahead, what other conditions were reported to you, if any were?

A. Conditions such as the heifers being stunted, not growing as they should even though they were grading them. Such things as that.

Of course, by observation I observed teeth lesions, complaints, both from my personal observation and also the farmers' history, diarrhea in the animals. Also hoof complaints and observations of animals walking stiff, of animals' hoofs abnormally growing out and generally unhealthy and unthrifty condition of the dairy herds from men that I knew are good dairymen from being with them and seeing the way they are running their dairy farms." (III-245-247)

Dr. Keller investigated these complaints and soon concluded that the problem was fluorosis which he defined as follows:

> "Now Doctor, based on the investigation that you are telling us about and your study of this problem, can you advise the Court as to what the symptoms of fluorosis are in cattle?
>
> A. In my opinion there are two distinct classes of symptoms of fluorine poisoning in cattle. One is the acute symptoms of fluorosis such as diarrhea, lack of appetite. Under acute you can put reduced milk production also. Rough hair coat, lameness, walking with a rather arch in their back. Also we have the symptoms of chronic fluorosis which are evidenced by mottling, staining, abnormal wear of the teeth, exostosis of the bones, elongated feet, and also lamenesses that are caused by permanent bone malformations or exostosis.
>
> THE COURT: Is fluorosis a kind of a general term that refers to all kinds of disabilities that comes from fluorine, or is it limited to a certain kind? What does that word mean?
>
> * * *
>
> A. Fluorosis is in my opinion a term, explanation of the term is the, is syndrom of both chronic and acute symptoms produced in cattle by the ingestion of fluorine compounds." (III-250-251)

He continued to work on the problem. In 1950 he extensively surveyed areas around aluminum plants and away from them with another veterinarian; he found no symptoms in the outside areas. Based on seven years' histories as to the Camas area plus his observations of the teeth and condition of the cattle, Dr. Keller testified that the *Arvidson* herds had fluorosis as of the time he was testifying and earlier. He felt sure that the Hester cattle were in much better shape when he saw them in

Aurora, Oregon, than they had been at Washougal (III-271). Fluorosis was present in the *Whiteaker* herds also as of November 1953, said Dr. Keller. These latter herds he had seen but once, but, of course, he had his general background to aid in diagnosis.

Dr. Guard had seen the *Arvidson* herds but once, but he had been the regular veterinarian for the *Whiteaker* herds since 1946. As to the *Arvidson* herds Dr. Guard did not see Hester's or Stauffer's and he was unwilling to make a diagnosis of the Norelius, Johnston and Ray Arvidson herds because the tooth picture was inconclusive and he did not have the histories (VII-1780, 1784, 1785).

Dr. Guard had not only been the regular veterinarian for the *Whiteaker* herds; he had examined 100 herds in the Longview area for fluorosis (VII-1747), including some for Reynolds (VII-1786). On cross-examination, he said he thought all 100 herds were affected by fluorosis except those protected by a hill between them and the Reynolds plant (VII-1805). In the summer of 1953 he saw three herds in the Longview area and located near the Rawnsley, Goldsmith and Josephson places. He named the owners and at that point in his testimony generalized to say that in his opinion the herds *are worse now (1953) than they were a couple of years ago* (VII-1760). Dr. Guard was in general agreement with Dr. Keller's definition of fluorosis (VII-1748).

Probably the sharpest area of conflict between Drs. Keller and Guard on the one hand and respondent's veterinarians on the other is that Drs. Keller and Guard be-

lieved that cows were necessarily injured systemically (i.e., for example, they were producing less milk than they should) if there were fluorine stains on their teeth. On cross-examination Dr. Keller put it this way:

> "Q. Is it conceivable that this condition where teeth are stained can be characterized just as a cosmetic matter, that is, just a matter of appearance and nothing else from the standpoint of the animal's wellbeing?
>
> A. I don't understand your meaning of cosmetic there.
>
> Q. Is it possible to have stained teeth without skeletal or systemic damage to the animal, that is, without these other symptoms that you referred to?
>
> A. In my opinion, no on acute fluorosis.
>
> Q. In other words, you would state that wherever you had stained teeth it would mean that there would be some other damage to the animal?
>
> A. Where you have the chronic symptoms of fluorosis I believe that there is an internal damage also. If the animal is taken out of the area, then the acute symptoms probably and will most of them not be evident.
>
> Q. Is it possible to have damage—is it possible to just have the stained teeth without any other impact upon the animal physically?
>
> A. In my opinion when the animal has ingested enough fluorine to stain the teeth there is a very, very great internal and systemic damage." (III-311-312)

On direct examination, particularly with reference to the Goldsmith (VII-1770) and Ford (VII-1779) herds, Dr. Guard corroborated Dr. Keller. Dr. Guard's opinion was that if some animals in a herd showed fluorine stains on the teeth, the milk production of the *herd* was affected. He made this very clear on cross-examination as follows:

"Q. (Continuing) Dr. Guard, I now refer to your statement with reference to the damaging effect of fluorosis on the herd as to its—strike that out. You recall testifying, Dr. Guard, before noon recess that if you find fluorosis in some of the cows of a particular herd you diagnose the entire herd as being damaged by fluorosis, is that correct?

A. I have always made that assumption, yes.

Q. And under those circumstances that herd has no value as a dairy herd in that place; you recall saying that?

A. I will qualify it to say a profitable dairy herd." (VII-1826)

In support of Dr. Keller's and Dr. Guard's opinions, it is worth pointing out that Dr. Guard, upon a routine post mortem examination of a Rawnsley cow, had discovered considerable kidney damage and completely destroyed gland tissue (VII-1839). Dr. Guard also considered, in his testimony, the physical fact that the *Whiteaker* herds had fallen off considerably since the fall of 1952 when Reynolds started putting out 80% more fluorides than formerly (VII-1673). He said:

"Q. Doctor, there is evidence in this lawsuit that those four herds that you have been taking care of in Longview since 1946 have fallen off very considerably in their milk production beginning last fall. Those are the figures I read you this morning. In the light of that fact, which is in evidence here, what have you to say as to economic damage to those animals?

A. Well, that is why I have drawn my conclusions that when their ingestion of poison which affects metabolism so severly and the first symptoms that a cow shows whether it is fluorine poisoning or too much apples, they drop in the milk production. I mean that is one of the first symptoms that an animal takes in something abnormal to her sys-

tem before they even have time to bother the teeth, would make her drop in milk production.

Q. *In other words, the first thing that happens when a cow gets sick is that she loses milk?*

A. Right." (VII-1836-37, emphasis supplied)

It was also Dr. Chapman's view (for respondent) that loss of milk production was the first characteristic of a sick cow (VIII-2134-35).

As pointed out below (pp. 68-74), respondent's three veterinarians' views to the contrary of the views expressed by Drs. Keller and Guard have considerably less support in the transcript. Other things being equal, they did not see the cows nearly as often, they had no histories to work from, they took no production records into consideration and they conducted no post-mortems.

Rex Ross was petitioners' cattle expert. Respondent apparently could find no witness to rebut what he said. Mr. Ross gave his opinion as to what all eight dairy farms (except Mr. Rawnsley's) would produce under normal conditions and he also said what their culling rates would be under normal circumstances. As to Mr. Ross' qualifications, he has imported some 60 Jersey cattle which sold here from $1800 to $5000. When he first bought cattle on the Island of Jersey there wasn't much available in the way of production records, and so he judged production solely on conformation (and, at average prices, he bet $180,000 on that judgment) (V-771). In his testimony, Mr. Ross said on cross-examination that he did not rely on, or even consult, production records even when they were available in buying cows for his own herd (VII-1569-70). Mr. Ross

is frequently a judge at stock shows (V-772); he was president of a milk distributing outfit for 10 years (V-773); and he was President of the Oregon Jersey Cattle Club for two years. He frequently buys cows for commercial operators (V-775).

With Mr. Ross's background, particularly with his experience in buying cattle by eye alone, it is not surprising that he was able to state what production would be obtained under normal conditions as to the *Arvidson* herds though he saw them only in 1951 and 1953 and to state what normal production would be as to the *Whiteaker* herds (except Rawnsley's) though he saw them only in 1953. His normals were based not only on the cattle themselves, but on the manner in which they were cared for, what they were fed, etc. (See, for example, his discussion of the Isbister herd (V-785-790).) The fact that Mr. Ross did not know what the *Arvidson* herds were actually producing before he saw them (V-814) nor before he testified (V-834) is additional evidence of his ability to judge production by eye alone. The approximate difference, in terms of lost butterfat, between Mr. Ross' normal production and actual production is summarily stated above (pp. 49-50).

Further support for Mr. Ross's normals lies in the Whiteaker settlement story. Normal at that farm would be 400 pounds B.F., Mr. Ross said (VII-1550). When Reynolds settled with the Whiteakers up to November 1948, they received 20% in addition to actual production for the three prior fiscal years (VI-1474). Those three years average 358.7 (p. 48) *and only one of those*

*years was a non-fluorine year* (p.51). 358.7 plus 20% equals 430.4.

Mr. Ross also testified what normal culling ought to be. Mr. Isbister's should be 10 to 15%; Mr. Stauffer's, 18 to 20%; and Mr. Baker's 15 to 18% (V-819, 821). Mr. Isbister was raising two to three heifers per year (IV-485) for a herd averaging 7.1 cows (IV-473). This is a culling rate of about 35%. Mr. Stauffer has had 27 cows on the average beginning in 1948 (IV-660). He raises seven to 10 heifers per year which are not enough to keep the herd going (IV-627). This is a cull of over 32%. Mr. Baker has averaged 28 cows (IV-671); he raises 6 to 8 heifers per year (IV-675) for a cull of 25%.

Finally with respect to Mr. Ross' testimony, he had occasion to see the Hester cattle several times after they were moved to Aurora. They are in better shape now than when he first saw them in 1951 after the move from Washougal (V-818). In seeing petitioners' cattle, Mr. Ross saw quite a lot of scouring and rough hair coats (V-825). He also saw some stiffness in the herds and he mentioned the Depoe herd in this connection. Mr. Ross corroborated Mr. Rawnsley in general as to the duration of a normal lactation (V-830).

Ross Coie was the Manager of Evergreen Breeders, an artificial insemination organization. Sires from Evergreen have been used in the Rawnsley herd since 1947. Beginning in 1952, the Evergreen producing daughters constituted the majority of the herd and in 1953 strongly predominated (VI-1279). As of 1953, Mr. Coie testified that normal production of the Rawnsley herd would

be 485 B.F. (VI-1279) which is only 55 pounds more than it did do (without Evergreen) in the fiscal year ending 1949. In 1949 the herd had been subjected to the least amount of fluorine in any year for which records are available (p. 50). Exhibit 914 shows the high quality of the Evergreen bulls used at the Rawnsley place. One, for example, used on farms other than Rawnsley's, increased the daughters' production over their dams by 64 pounds B.F. (VI-1266). Clearly this confirms the reasonableness of Mr. Coie's normal.

Mr. Coie was thoroughly familiar with the Rawnsley farm and the Rawnsley cows. He had been on the farm from time to time over the last 10 years (VI-1260). He also was familiar with what fluorosis cows looked like, having seen them when he was County Agent for Clark County in 1942-1946 (VI-1258). In going over the Rawnsley farm he had observed the quality and amount of the roughage grown there and thought the place would carry 50-60 cows and their replacements (it has averaged about 36 cows for the last six years) (p. 48). He had seen Mr. Rawnsley feed his cows and thought he fed good quality feed liberally (VI-1271). He took these factors into consideration in estimating normal production (VI-1279).

Mr. Coie was on the place in June, 1953. He thought (as did Mr. Rawnsley) that the cattle were 30% undersize; that they were stiff, thin and long haired and that the calves were a disgrace (VI-1283). On cross-examination, Mr. Coie said he knew how the cattle were fed because he had studied the feed records (VI-1293).

Dr. A. O. Shaw, Chairman of the Department of Dairy Science at Washington State College, is a specialist in the nutrition of dairy cattle. He had prepared an exhibit (915-332) which showed how much nutrients it took to produce various amounts of milk. This exhibit was received without objection (VIII-2151). Dr. Shaw had visited six of the eight farms discussed in this petition. On the witness stand he was informed what Messrs. Rawnsley, Josephson and Goldsmith fed their cattle and he testified that what they fed was enough to maintain body weight and make the normal production the cattle experts had testified to (VIII-2163-2166). At that point the following stipulation was entered into:

> "MR. CRONAN: Your Honor, I believe it may be stipulated between myself and counsel for the defendant that the witness, Dr. Shaw, has familiarized himself with the amounts of feed fed by the farmers in each of the cases now being tried and that his opinion would be if asked, that that level of feed intake is sufficient to support the production on the average per cow in each herd in litigation under normal circumstances as that production is defined under normal circumstances in this record.
>
> THE COURT: To which the defendant stipulates that the witness would so testify, and you want your reservation of your objection to it on the grounds that you already stated, namely speculative and so forth, is that right?
>
> MR. YERKE: Yes, and also, of course, your Honor, the additional objection that the hypothetical question fails to take into consideration the age and breeds of the animals involved.
>
> THE COURT: As I understand it, the matters that may be assumed by the witness are basically the same matters obtained by Mr. Ross by way of hypothesis when he testified what he considered normal production under normal circumstances.

MR. CRONAN: Yes.

MR. YERKE: All right.

MR. CRONAN: Also the normal levels are those testified to by Mr. Ross.

THE COURT: Very well. The objection will be overruled and the stipulation will be received and I will then understand from this that the witness now on the stand would, if he were taken through each of the several herds, testify that in his opinion the quantity of feed referred to in the testimony of the several claimants for plaintiffs would produce the quantity of butterfat per cow per herd per year that has been put into the record by the witness Ross and witness Coie, correct?

MR. CRONAN: Correct, your Honor." (VIII-2168-2170)

Dr. Cheldelin, an Oregon State College bio-chemist, had done research work with *organic* and *inorganic* fluorides which involved taking the enzyme systems out of animals and studying their behavior as they oxidize glucose in the presence of both types of fluorides (IX-2516). Although an aluminum plant discharges inorganic fluorides, his opinion was that the grasses with which they come in contact would convert some of them into organic fluorides (IX-2518), and that the organic fluoride which would be the most likely product is fluoro-acetate (IX-2524). Dr. Cheldelin had personally experimented on animal tissue with fluoro-acetate and sodium fluoride (as indicated below, respondent's experts used the latter exclusively) (IX-2525). Dr. Cheldelin explained that sodium fluoride will block the conversion of starch, but not fat or protein so that it takes a lot more sodium fluoride to have a lethal effect upon an animal (IX-2528). On larger animals, sodium fluoride will cause a

discoloration of the teeth, but fluoro-acetate will cause a reduction in the rate of metabolic processes (IX-2531). A cow receiving a sub-lethal dose of fluoro-acetate would accordingly lose milk production as an *early effect*. 1 ppm in the forage of a 1200-pound cow would be enough to cause severely toxic effects, if not death (IX-2535). Dr. Cheldelin was asked to comment on the relation between feeding sodium fluoride at rates from 7 to 75 ppm (respondent's experts' experiments) and the feeding of forage which had been exposed to hydrofluoric acid and cryolite from an aluminum plant. He saw no connection between the two, although the sodium fluoride feeding would demonstrate the effect of sodium fluoride (IX-2534).

We grant that Dr. Cheldelin had never extracted fluoro-acetate from grass growing around aluminum plants. He had experimented with fluoro-acetate, though, and knew its effects. In view of the undeniable fact that petitioners' cattle produced less with Reynolds' fluorine than without it, is not Dr. Cheldelin's view that they were eating something having a different effect than sodium fluoride more reasonable than the opinion for respondent that they were eating the equivalent of sodium fluoride?

Respondent, defending, took the unqualified position that no farmer had suffered any loss that was attributable to Reynolds' operations. Speaking generally, respondent produced, in support of this position, Drs. Phillips and Schmidt who saw none of the cattle, but who were conducting admittedly uncompleted experiments, respectively in Wisconsin and California. These

experiment were being carried on for the purpose of showing that milk cows fed *sodium fluoride* for the first time *after* they reached maturity at levels in excess of the fluoride levels to which petitioners' cows had been subjected, suffered no damage. This, of course, assumes that sodium fluoride has the same effect as fluorides from an aluminum plant. Whatever the effect of sodium fluoride upon milk cows may be, we have seen from the physical facts in evidence alone (pp. 50-51) that fluorides from an aluminum plant do cause a loss in milk production. Moreover, Dr. Cheldelin's testimony reviewed just above raises at least a very considerable doubt that the cattle were consuming the equivalent of sodium fluoride.

Respondent also produced three veterinarians, Drs. Garlick, Phelps and Chapman. Dr. Garlick saw the *Arvidson* herds once in 1951 and the *Whiteaker* herds once in 1952. Dr. Phelps saw the *Arvidson* herds in 1951 with Dr. Garlick; and he saw them again late in the summer and fall of 1953. Dr. Phelps saw the *Whiteaker* herds in the summer and fall of 1953 as did Dr. Chapman. Dr. Chapman also saw the *Arvidson* herds in the summer and fall of 1953 with Dr. Phelps. Some of these herds were seen several times by one or more of the veterinarians. Substantially, though, Drs. Phelps and Chapman saw the *Arvidson* and *Whiteaker* herds just before trial; Drs. Garlick and Phelps saw the *Arvidson* herds two years earlier in 1951; and Dr. Garlick saw the *Whiteaker* herds late in 1952.

With one or two exceptions not worth mentioning, respondent's veterinarians *saw* nothing wrong with peti-

tioners' cattle and *inferred* there had been no economic damage. With the exception of Dr. Garlick, who looked into the Whiteakers' milk production once early in 1951, nobody testified for respondent whether the actual milk production was more, less or about the same as it should have been. All of the production records in both cases were available to respondent before trial; in fact, the *Whiteaker* petitioners' herd books are still marked as deposition exhibits.

We think the reason nobody testified for respondent how close actual production was to what it should have been is because the production records would not stand analysis and respondent knew it. Instead of producing cattle experts, respondent relied on the admittedly incomplete experimental work of Drs. Phillips and Schmidt and the three veterinarians. These veterinarians had done no experiments of their own relating fluorine intake to butterfat loss. They nevertheless testified that there couldn't have been any butterfat loss because the degree of tooth damage was too slight. In so concluding, they were obviously relying on the incomplete experimental work of Drs. Phillips and Schmidt.

This incomplete experimental-seldom seen cattle defense prevailed below. Obviously the trial Court gave more weight to it than to (a) observations of dairymen who had operated in and out of fluorine conditions up to 40 years, (b) the physical facts clearly showing that there was a butterfat loss, and (c) petitioners' experts. The trial Court particularly relied on Drs. Phillips and Schmidt (I-93-4; App. A, Part I, p. 86).

No invidious comparison is intended between the experts on the two sides. Other things being equal, however, it is pretty clear that Drs. Keller and Guard were in a better position to diagnose the presence or absence of fluorosis in the cattle than were Drs. Garlick, Phelps and Chapman. Starting about eight years before the trial, Drs. Keller and Guard were the regular veterinarians for petitioners' herds. Accordingly, they were in a much better position than respondents' veterinarians to observe and they did observe the abnormalties of which the farmers complained.

Petitioners' cattle expert, Mr. Ross, was qualified to judge production based solely on observation. As we have seen, he bought cattle without considering production records either because there weren't any or, if there were, because he didn't think them necessary. He testified what petitioners' cows (except Rawnsley's) would produce under normal conditions. Mr. Coie, speaking from personal knowledge of the sires used in the Rawnsley herd and personal knowledge of the farm, testified as to those cows' normal production. Dr. Shaw, a clearly qualified nutrition expert, testified that what the farmers said they fed was enough to maintain body weight and the normal production testified to by Messrs. Ross and Coie (pp. 62-63). Respondent *made no effort whatever to rebut any of the testimony referred to in this paragraph.*

Dr. Cheldelin did not disagree with the sodium fluoride work of Drs. Phillips and Schmidt. He did, however, testify that what the cattle were eating was not the equivalent of sodium fluoride.

We shall close our remarks on the trial defense by commenting briefly on the testimony of Drs. Garlick, Phelps and Chapman.

Dr. Garlick was not unfamiliar with the complaints voiced by the farmers in the present cases. When he was in private practice in Tacoma, Washington, he was the regular veterinarian for the Eschbach herd which is near the Tacoma aluminum plant. In 1942 here's what he observed wrong with the Eschbach herd:

> "A. Well, when the animals become ill the first thing I noticed was, in the Eschbach herd of course, and that was a lameness, very acute lameness in the front feet particularly inside claws of the front feet, and that lameness interfered with the ability of the animals to forage. There was a concurrent loss in the body weight. There was a deterioration of the animals as far as general health was concerned.
>
> "It showed such known specific symptoms as rough hair coat. Those animals that were down and could not walk around did not wear back their feet properly and so the—the toes had a tendency to grow out. There was a drop in milk production in that herd." (VII-1859-60)

Dr. Garlick later testified that slight mottling of teeth could occur without the occurrence of any of the Eschbach symptoms, which symptoms he described as "systemic". However, what level the fluorides the Eschbach herd encountered and what the condition of their teeth was, Dr. Garlick did not say.

When Dr. Garlick saw the Depoe (one of petitioners) herd he photographed some animals with an odd stance. He commented on the pictures at the trial and said the

trouble was osteomalacia, not fluorosis. He distinguished between the two on cross-examination:

> "Q. You have seen many cows that had fluorosis that had exactly that same gait and same stance, haven't you?
>
> A. No, I have not. There is a difference because *in fluorosis animals the tenderness is very acute in the front feet* and an animal that has fluorosis will generally go down on her knees or stand with her legs doubled forward, her front legs doubled forward and trying to take as much weight off as possible over those front legs rather than trying to evenly distribute it over the four." (VII-1873; emphasis supplied.)

*Mr. Isbister encountered precisely this difficulty with the front feet of his animals* (IV-479).

Dr. Garlick saw the production results in the Whiteaker herd book in May, 1951 (VIII-1919). He then also saw the animals in the field but did not look at any teeth although he knew fluorine might have been a problem in May, 1951, because the herd was in a fluorine area (VIII-1956). Based upon Dr. Garlick's field observation in May, 1951 and his study of the herd book at that time, he concluded that an adequate production level would be 365 B.F. on the average ("approximately a pound of butterfat per day" (VIII-1958) ). When Dr. Garlick saw the herd book, the herd had just completed the year 5/1/50 - 4/30/51 and was doing 307 (p. 48). Sterility accounted for its failure to do 365, according to Dr. Garlick. He didn't know the reason for the sterility (VIII-1921).

The diagnosis of sterility begs the question, we think. Among other difficulties reported by the farmers to Dr.

Keller when he first got to the Camas-Washougal area in 1945 were disturbed heat (oestrum) cycles in the cows (III-245-6). On cross-examination of Dr. Garlick the following occurred:

> "Q. Dr. Garlick, are you familiar with this Bulletin 123, Research Bulletin 123, October 1934, Agricultural Experiment Station of the University of Wisconsin, 'Chronic Toxicosis in Dairy Cows Due to the Ingestion of Fluorine' by Paul H. Phillips, E. B. Hart and G. Bohstedt?
>
> A. I am.
>
> Q. Would you agree or disagree with this statement under the summary and conclusions on page 28, conclusion three:
>
> > 'Fluorine in the ration of dairy cows does not cause a functional failure of the reproductive processes, but it does delay oestrum following parturition and lowers the birth rate of newborn calves. The nutritional state of the animals suffering from chronic fluorosis is thought to be responsible for these results.'
>
> Do you agree?
>
> A. I agree that Dr. Phillips is recording his observation. However, I have not observed it in my observations and the other workers who have observed it in regions of the aluminum plants have not observed the condition." (VIII-1959-60)

While Dr. Garlick does not agree with the above quotation from Dr. Phillips, and Dr. Phillips himself has now considerably limited it, Dr. Garlick is still confronted with other Whiteaker D.H.I.A. results. Since there is a variation of 303 to 373.9 in the Whiteaker annual results and since Dr. Garlick thought 365 would be normal, it is evident, if the 365 is correct, that sterility has not always been a problem. If the herd had a sterility problem at 307 average production in May 1951, why

was it at 303 in May 1953? Was there still a sterility problem? And if there was, why is it that the herd went up from 307 to 335 in the year after Dr. Garlick looked at the herd book? When Dr. Garlick saw the herd in December, 1952, the herd book, which he did not then look at (VIII-1976), showed 335 as of 4/30/52. At that stage Dr. Garlick, had he looked at the book, might have thought he had been right about sterility in 1951 since the herd production was up 10% and since there had been a considerable infusion of new blood in the herd begining October 1951. How would he feel about this though, in view of the fact that the herd again plunged to 303 in the year ending 4/30/53? If Dr. Garlick had really been trying to diagnose the herd, would he not have informed himself a little better? Had he done so, we think he would have discovered that the only real variable in the Whiteaker situation (pp. 50-51) was the amount of fluorides consumed by the herd.

It will also be recalled that Dr. Garlick did not see the *Arvidson* herds after the summer of 1951 nor the *Whiteaker* herds after December 1952. No fluorine changes take place in the teeth after the bud stage (when the tooth can't be seen), Dr. Garlick informed the Court (VIII-1948). Dr. Garlick did not say how long the bud stage was, but Dr. Phelps said it was six months (VIII-1947). Even after the tooth emerges from the gum, Dr. Garlick can't tell about exposure to fluorine till the cuticle wears off (VII-1861). Dr. Garlick's knowledge of fluorosis in *Arvidson,* when he testified, therefore, was not more up to date than three years earlier. Since he saw the *Whiteaker* herds only in December 1952, he

could have seen nothing on the teeth with respect to Reynolds' 80% increase in fluoride discharge which took place in August 1952.

On cross-examination Dr. Phelps made it very clear that when he was talking about "fluorosis" he was describing the point where there is "systemic damage" to the annimal (IX-2325). On direct, he had said that cows could have mottled teeth without fluorosis. On cross he went on to say that until the "systemic" stage was reached, there was no loss in milk production (IX-2347). Dr. Phelps had found no "systemic" damage on such visits as he made for this litigation. Nor had he when testifying on at least two, and possibly three, previous occasions (IX-2361-3). However, when participating in settling claims for Reynolds, Dr. Phelps' attitude was somewhat different. He admitted on cross-examination that when he made a report for Reynolds in connection with the Whiteaker release, the animals had not been systemically injured (IX-2336). In connection with the Rawnsley release, five cows were systemically injured (IX-2341). Others had mottled teeth and were not systemically injured (IX-2343). No animals were systemically injured when Goldsmith's claim was settled (IX-2346). Dr. Phelps finally admitted that in connection with these releases he had determined the difference between normal and salvage values in all cases where there was *any* mottling (IX-2343) for the reason that we (meaning Reynolds and himself (IX-2344) ) ". . . were probably going overboard a little bit . . ." (IX-2343). Dr. Phelps does not go overboard in litigation.

Dr. Chapman changed his opinion somewhat too. At the trial he made it clear that when he was talking about "fluorosis" he meant damage (VIII-2115). He said on cross-examination that the first symptom of fluorosis was mottling of the teeth (VIII-2123). In connection with that statement, there was read to Dr. Chapman a part of an article he wrote when he was employed by Oregon State College to make a fluorosis survey. The extract and the surrounding colloquy was:

"Q. What do you consider the first symptoms of fluorosis in dairy cattle?

A. I think the *first thing I notice will be mottling of the teeth.*

Q. Would you agree with this statement [from the Chapman article]:

'Symptoms develop slowly and are *most noticeable in lactating cows. Early symtoms* are decreased food consumption, *decreased lactation,* intermittent diarrhea and general loss of condition and appetite. *As the diet progresses there may be changes in bones and teeth.*'

Would you agree with that?

A. No.

Q. Would you agree with this statement:-

A. I got my sequence mixed up.

'Young animals make a poor growth and often appearing to be suffering—'

THE COURT: Excuse me, just a minute. What did you say there?

THE WITNESS: The sequence.

THE COURT: Oh, the sequence of the symptoms?

THE WITNESS: Of the symptoms.

THE COURT: I see.

Q. (Continuing) You changed your mind as to that?

A. That is right." (VIII-2123-24; emphasis supplied.)

Later, on recross-examination, Dr. Chapman made it pretty clear that his sequence was right when he wrote the article. He said:

> "Q. Any little thing upsets their milk production, don't it?
>
> A. Yes, practically anything that would upset it, upset her normal eating or even disturbance, *just examining the cattle will upset the milk production slightly.*
>
> Q. Sure, depending on the degree? On the other hand, if some farmer called you some night and tells you he has got a sick cow, it is quite the common practice among veterinarians to ask, 'Well, how much is she off on her milk production?'
>
> A. One of the first things you ask.
>
> Q. One of the first things you ask?
>
> A. That is right.
>
> Q. And if she isn't off on her production very much you don't consider it too terribly serious?
>
> A. I will think she will wait until morning, and if they don't get any, I say, 'Well, it is too late to autopsy.' (Laughter)
>
> Q. It doesn't take very much to throw her off milk production, does it?
>
> A. Well, *it doesn't take any marked change to alter the milk production of a cow.*" (VIII-2134-35; emphasis supplied.)

We noted above (p. 66) that the defense at the trial was an incomplete experimental-seldom seen cattle defense. We also pointed out that respondent's veterinarians, who saw the cattle but little, were basing their conclusions that the cattle couldn't have been injured on the incomplete experiments of Drs. Phillips and Schmidt who never saw the cattle. While petitioners produced some experts also, the trial was no mere battle of experts. Supporting petitioners' experts were the personal

day by day observations of petitioners themselves whose testimony showed a remarkable consistency as to the type of injuries suffered by their cattle (pp. 42-47) and the physical facts including the documentary evidence (pp. 50-51) showing that there really was a milk loss.

The defense was completely an expert defense. In 32 C.J.S., Evidence at p. 393, § 569, appears this statement: ". . . courts of the highest eminence . . . feel that experts are frequently rather the hired advocates of the parties than men of science placing their special experience at the service of the cause of justice . . ." A recent opinion of the Oregon Supreme Court is to the same effect. In *Oxley v. Linnton Plywood Ass'n,* 205 Ore. 78 at p. 103, the Court observed: ". . . The cruiser testifies as an expert witness, and his testimony, like that of all expert witnesses, is viewed with some suspicion . . ."

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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November 9, 1956.

# APPENDIX A

## Part I

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON
SOUTHERN DIVISION

| | | |
|---|---|---|
| ALBERT A. ARVIDSON, et al, Plaintiffs | ) | |
| v. | ) | |
| REYNOLDS METALS COMPANY, a corporation, Defendant | ) | Civil No. 1,415 |
| | ) | DECISION |
| W. J. WHITEAKER, et al, Plaintiffs | ) | Civil No. 1,653 |
| v. | ) | |
| REYNOLDS METALS COMPANY, a corporation, Defendant | ) | |

Plaintiffs in the Arvidson case operate fourteen farms in Clark County, Washington. Their complaint filed in December, 1950 seeks damages and injunctive relief against defendant because of alleged damage to lands and cattle claimed to have been caused by fluorides discharged from defendant's aluminum plant at Troutdale, Oregon. The Whiteaker complaint was filed in November, 1952 by plaintiffs operating four farms in Cowlitz County, Washington seeking the same relief under similar

allegations relating to the operation of defendant's aluminum plant at Longview, Washington. The cases consolidated for trial involve generally identical questions of law and fact. Seventyfive witnesses testified and 342 exhibits were admitted in evidence. The court visited every farm involved, saw many of the cattle and inspected both aluminum plants with particular attention to their fume control systems. Prior to the trial, on motion and after full hearing, the applicable statute of limitations was determined by the court. Extensive briefs on the liability issues, together with a transcript of 2,500 pages, were submitted. Following the argument on liability the court indicated orally and at some length its then view of the controlling facts, reserving final decision on all points for written opinion.

A detailed analysis of the evidence would greatly lengthen this opinion and would not serve any useful purpose. The evidence was closely followed as it was presented, copious notes taken and at the conclusion of the evidence the court made a memorandum summarizing its impression of each witness and the weight and value to be given to his testimony. The facts as now found are based on extended study and consideration of the entire record, which will be summarized largely in general terms.

The Troutdale plant was constructed for the United States in 1941-1942 by Aluminum Company of America and operated by that company from May, 1942 to September, 1945 when operations were shut down. Defendant commenced operation of the plant under a lease in

September, 1946 and with various short interruptions has continued the operation ever since. The plant was purchased from the government and deeded to defendant in June, 1950. The Longview plant was constructed by defendant and commenced operation in 1941. With various shutdowns defendant has operated the plant to the present time. In both plants aluminum is produced by processes which unavoidably cause gases, fumes and airborne particulates to be formed, some part of which are discharged into the atmosphere from the plant stacks. The effluence contains fluorides in some form and amount which eventually may be deposited on lands within a radius of ten miles or more of the plant, but the course, quantity and distribution thereof cannot be directly observed or known. Fluorides of some of the types escaping from the plants, if ingested in excessive quantities, are capable of causing damage to cattle.

Prior to defendant's first operation of the Troutdale plant in 1946 substantial improvements in the fume control system were installed at an expense of nearly $300,000. At the same plant defendant, at a cost of over two million dollars, completed installation in November, 1950 of an elaborate fume control system said to be as advanced and efficient as presently exists in the aluminum industry. From time to time various improvements in the fume control system at the Longview plant have been installed, the latest in 1949. Whether the measures taken by defendant to minimize the escape of fluorides from its plants are the maximum possible consistent with practical operating requirements is yet to be determined, but apparently American industry has not yet

developed anything better. The record shows that the United States has a very important interest in the continued operation of these plants for their large scale production of aluminum essential to national defense. Because thereof the government has contractual obligations to defendant concerning claims of the character presented in these cases and for reacquisition of the Troutdale plant in the event operation thereof be enjoined. The conclusions reached by the court as to the facts and law controlling of these particular cases make it unnecessary to decide defendant's contention that because of the commitments referred to the United States is a necessary party in the Arvidson case, but the circumstances just stated indicate the lawful and important character of defendant's operations. For the same reason, consideration of defendant's contentions as to the effect of the releases executed by plaintiffs is not required.

In a number of cases previously heard in this and other courts in this area awards for fluorine damage resulting from operation of the Troutdale and Longview plants have been allowed, but every such case involved periods when little, if any, fume control measures were taken and before the installation of the later of the fume control improvements referred to.

Plaintiffs' farms are located at various distances up to seven miles from defendant's plants. During various periods up to several years prior to the filing of the complaints plaintiffs grazed dairy and beef cattle on their farms. Most of the cattle claimed to have been

damaged were on the farms the whole of a two-year period prior to commencement of the actions.

Plaintiffs had the burden of establishing by a preponderance of the evidence that the market value of their farms was depreciated and/or that the physical condition and milk producing capacity of their cattle were damaged by fluorides emanating from defendant's plants. Extensive evidence was introduced for such purpose. Defendant's evidence, equally extensive, was to the effect that no depreciation in market value of plaintiffs' farms had occurred and that the maximum possible ingestion of fluorine by plaintiffs' cattle, whether attributable to defendant's plants or otherwise, was well within the amount cattle can take without damage either as to physical condition or milk producing capacity. Plaintiffs' veterinarians testified that plaintiffs' cattle had and were suffering from various conditions ascribed to fluorine; and dairy records purporting to show a loss in milk production were presented. Veterinarians engaged by defendant flatly denied that the physical defects in plaintiffs' cattle were due to fluorine and ascribed them, as well as any apparent decline in milk production, to poor husbandry and other causes and conditions unrelated to fluorine.

The expert testimony, in some instances given by scientists of national eminence, was in sharp conflict. Plaintiffs' experts testified that damage to plaintiffs' cattle could and did follow from ingestion of fluorine in the quantities shown by forage sampling in the area of plaintiffs' farms. Defendant's experts unequivocally and without reservation testified to the contrary.

All of the plaintiffs testified to personal observations of physical ailments and milk production performance of their cattle. Plaintiffs may have been sincere in believing that all of the ills of their cattle and all of the unsatisfactory conditions in their dairy operations were due to fluorine damage; however, rarely did a plaintiff voluntarily or readily acknowledge any cattle ailment, damage or unsatisfactory condition as being due to any other cause, no matter how apparent it might be. On the whole, the court was not favorably impressed with the personal testimony of plaintiffs. Almost every plaintiff on cross examination was badly discredited in various respects but primarily by (a) testimony at the trial directly contrary to testimony given by pretrial deposition; (b) reluctant admission of conditions and causes unrelated to fluorine accounting in many instances for the damage or condition complained of; (c) admission of substantial increases in income from dairy products during the years complained of as contrasted to earlier periods when fluoride effluence was as much or greater; and (d) the testimony of some plaintiffs in the Arvidson case that no injurious effects or damage were observed from 1942 to 1945 during the period Alcoa was operating the Troutdale plant without the fume control improvements installed by defendant when fluoride effluence must have been very much greater than during the period complained of. It would appear from the testimony last referred to that the cattle injury and loss of milk production complained of were either not due in any material degree to fluorine or were the result of an accumulation of fluorine deposits in forage over a period

including several years prior to the limitation period. In this connection it should be noted that the experts produced by plaintiffs testified that fluorine deposits on forage dissipate rapidly and do not accumulate over any great length of time, particularly in areas subject to frequently rainfall.

Each of the veterinarians examined all of the dairy cattle in plaintiffs' herds and cattle urine was tested for fluorine by defendant's veterinarians at various intervals during the period in question. Plaintiffs' veterinarians found a variety of physical conditions in the cattle which they considered evidence of fluorine ingestion and damage resulting therefrom. Defendant's veterinarians accounted for many of the ailments and defects referred to by ascribing them to other causes and categorically were of the opinion that none of the plaintiffs' cattle had suffered injury or damage in any respect by reason of fluorine ingestion, testifying that the urine analysis supported such opinion. The court was favorably impressed with the ability, integrity and thoroughness of defendant's veterinarians and, to say the least, is of the opinion that there is no preponderance in favor of plaintiffs in the evidence of the veterinarians.

Another phase of the evidence was concerned with studies of the quantity, character and distribution of fluoride effluence from defendant's plants. Plaintiffs' evidence indicated a greater quantity and wider distribution of effluence than the evidence offered by defendant; however, the range of difference between the estimates does not appear to be particularly significant in

view of the low quantity at maximum of escaping fluorides distributed over a large area. This is indicated by the testimony of plaintiffs' witness, Dr. Cadwell, who testified that at the rate of fluoride escape estimated by plaintiffs' witness, Dr. Schulein, about ½ pound per acre per year would be deposited at two miles from a plant; 2/10ths to 3/10ths of a pound per acre per year at four miles from a plant; and 1/10th of a pound per acre per year at eight miles from a plant. Dr. Cadwell testified that a half pound of particulates would be about the size of his fist in volume.

A very extensive program for sampling forage and testing it for fluorine content has been conducted over a period of years in a wide area surrounding defendant's plants. The work has been done by state and college scientists aided and assisted by defendant and others. The results of this work are shown in the agreed facts stated in the pretrial orders and in the evidence. There is little, if any, dispute as to the samples taken and their fluorine content as shown by laboratory measurement, but the interpretation of the data is in conflict. The conflict largely hinges on what part of the fluorine found in the samples is to be considered within the limit naturally and normally found in vegetation and what part is to be charged to deposits presumably emanating from defendant's plants, as to which a great many variable factors, some involving scientific questions not yet fully settled, must be considered. A fair inference from a full consideration of the evidence on this phase of the case is that some part of the fluorine found in the forage at points within the vicinity of plaintiffs' farms during the

period in question in these cases is attributable to fluorides escaping from defendant's plants, but the amount and character thereof is a matter of speculation and cannot be determined with any degree of certainty. In all probability some areas in the near vicinity of the plants receive deposits of particulates or solids in a minute and powdery form so fine as not to be observable even by scientific methods. There is no evidence in the record indicating that direct observation of solid deposits have been made on plaintiffs' farms or at any other place as distant from the plants as the nearest of plaintiffs' farms.

A further factor complicating the matter is the necessity of using test data from samples gathered at more or less infrequent intervals at scattered points and attempting to draw inferences from averages of such data as to particular properties not precisely at a sampling station. It is apparent from the data itself that rather wide variations occur geographically, climatically and by season. When all of these matters are considered it can be seen that any specific finding of fluorine content in forage on the particular property of any plaintiff must very largely if not wholly be a matter of speculation and conjecture.

The next branch of the evidence to be considered has to do with the testimony given by the several scientists on both sides of the case concerning the quantity of fluorine necessary to produce toxic effects in cattle. Much scientific research has been devoted to this subject and is continuing. Elaborate controlled experiments have been conducted in this field over a period of years

but ultimate conclusions generally accepted by scientists have not yet been reached. It may well be that individual peculiarities of cattle and the area in which they are grazed will prevent any absolute scientific finding which will be generally applicable as a measure of, or even general guide to, the quantity of fluorine that will physically injure cattle or lower their milk producing capacity.

The court was much impressed with the ability, scientific attitude and credibility of Dr. Paul H. Phillips, Professor of Biochemistry at the University of Wisconsin, and Dr. Harold J. Schmidt of Stanford University Research Institute. Each is one of the very few top authorities in his scientific field and both testified in a frank and fair manner giving the impression of scientific candor and objectivity. These men have given special attention over a long period of time to the effects of fluorine ingestion in cattle and have personally conducted elaborate scientific experiments with extensive herds devoted exclusively to such purpose. Both Dr. Phillips and Dr. Schmidt testified without reservation that cattle could and actually had ingested fluorine over considerable periods in amounts far exceeding the maximum shown to have been available for ingestion by plaintiffs' animals without injurious effect either as to physical condition or milk production capacity. Plaintiffs' witness, Professor Cheldelin, testified that in his opinion inorganic fluorine, such as found in the effluence from defendant's plants, after deposit on vegetation is absorbed in the plant cells and therein converted to organic fluorine developing thereby much more highly

toxic powers; but he admitted that such theory has never been demonstrated or proven by actual experiment and, at the present stage of science, is merely a matter of theory not endorsed by scientists generally. The court accepts the testimony of Dr. Phillips and Dr. Schmidt at substantially full face value and in doing so cannot but conclude that on the issues covered by their testimony, plaintiffs have wholly failed to sustain the burden of proof resting on them in these cases.

The final general issue of fact covered in the evidence relates to plaintiffs' claims of depreciation in the fair market value of their real properties. Two realtors testified for plaintiffs and two for defendant and again the opinions expressed were in sharp conflict. Mr. Holbrook and Mr. Rodman made unusually careful and extensive studies of land sales in the vicinity of plaintiffs' properties over a ten-year period and the extreme care taken by them in examining the properties and considering every favorable and unfavorable element bearing on the market value of the land was very impressive. In my opinion the evidence overwhelmingly preponderates against any finding that the real property of any plaintiff has been depreciated in market value in any amount whatever during the period in question by reason of the operation of defendant's aluminum plants.

In the light of the conclusions thus summarized, as well as from a consideration of many phases of the record not particularly mentioned, I have reached the following basic conclusions on the factual issues of the case: Plaintiffs have not sustained the burden of pro-

ducing a preponderance of credible evidence to establish (a) fluorine content in the forage on their lands in amounts above non toxic limits; (b) substantial fluorine content in forage attributable to effluence from defendant's plants; or (c) that plaintiffs' lands or cattle sustained fluorine damage in particulars and amounts that can be determined with reasonable or any certainty.

Under this view of the evidence, the basic question of law presented is as to the legal basis of the rights of action on which plaintiffs seek relief in these actions. In the complaints and pretrial orders plaintiffs grounded the actions in trespass, as distinguished from trespass on the case, and later asserted nuisance as an alternative basis of liability. An injunction restraining continued operation of defendant's plants and damage awards were prayed for. Early in the proceedings the removal of the actions to the Oregon District Court on the ground of *forum non conveniens* was sought by defendant. The matter was extensively briefed and argued before then District Judge James Alger Fee sitting in this court by assignment. In an opinion reported at 107 Fed. Sup. 51, Judge Fee, on the allegations of the complaints and upon the oral statements of plaintiffs' counsel during the hearing on the motion for removal, for the limited purposes of that motion accepted plaintiffs' contention that the actions sounded in trespass. Removal was denied for several reasons but principally because under Oregon Supreme Court decisions that court has held itself without jurisdiction to deal with actions for trespass on lands outside of Oregon. There is no indication in Judge Fee's opinion or elsewhere in the record that con-

sideration was given to the Washington law as to whether actions of the nature of the present cases sound in trespass rather than trespass on the case. Washington law was neither directly nor indirectly considered, stated or applied in the removal decision. The parties agree that under *Erie R. Co. v. Tompkins*, 305 U.S. 673, on substantive issues the cases must be decided according to Washington law.

By appropriate motion prior to settlement of the pretrial orders, the applicable period of limitation of action under Washington law was presented, argued at length and determined by informal memorandum decision. The Washington statute RCW 4.16.080 provides a three-year limitation for:

> "1. An action for waste or trespass upon real property:
>
> 2. An action for taking, detaining or injuring personal property, including action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated."

RCW 4.16.130 provides a two-year limitation for actions not otherwise covered in specific statutes of limitation. The pertinent portions of this court's memorandum decision on limitation are: "When RCW 4.16.080 (Rem. 159) and RCW 4.16.130 (Rem. 165) are considered in the light of the long settled and frequently applied interpretation thereof by the Washington State Supreme Court there is no room for doubt that neither subsection (1) nor subsection (2) of RCW 4.16.080 (Rem. 159) is applicable to the above cases. I am fully satisfied that

under the allegations in the pleadings of the above cases the two-year limitation provided for under RCW 4.16.-130 (Rem. 165) must be applied to the claims for damages both to real and personal property. This conclusion seems inescapable under the following decisions construing subdivision (1) of RCW 4.16.080 (Rem. 159):

*Suter v. Wenatchee Water Power Co.*, 35 Wash. 1; 76 Pac. 298
*Weller v. Snoqualmie Falls Lbr. Co.*, 155 Wash. 526; 285 Pac. 446
*Riblet v. Spokane-Portland Cement Co.*, 41 Wn. 2d 249; 248 P.2d 380

and the following decisions construing subdivision (2):

*Northern Grain & Warehouse Co. v. Holst*, 95 Wash. 312; 163 Pac. 775
*Clark Lloyd Lbr. Co. v. Puget Sound & Cascade Ry. Co.*, 92 Wash. 601; 159 Pac. 774
*Irwin v. J. K. Lumber Co.*, 119 Wash. 158; 205 Pac. 424
*Constable v. John P. Duke*, 144 Wash. 263; 257 Pac. 637
*Noble v. Martin*, 191 Wash. 39; 70 P.2d 1064
*Luellen v. Aberdeen*, 20 Wn. 2d 594; 148 P.2d 849.

The conclusion above stated was reached entirely without regard to the fact that Judge Leavy held likewise in *Perrin v. Aluminum Company of America and Thayer* (W.D. Wash., S.D., 1950)."

The *Perrin* case, tried in this court, was concerned with alleged fluorine damage to land and cattle in Oregon due to plant operations in Washington. Judge Leavy found and stated the Washington law of limitation as indicated, which he held applicable as law of the forum.

Plaintiffs contend that under its circumstances the *Perrin* decision is not authoritative in the present cases either on limitations or on substantive law as to the legal basis of the actions. Determination of such contentions is not necessary since the Washington law of trespass and limitation stated herein is derived directly from the decisions of the Washington Supreme Court.

Implicit in this court's limitation decision was a determination of the legal basis of the actions as being trespass on the case under Washington law. Without concern whether such decision became law of the case, the subject has again been fully reviewed and reconsidered against the background of the evidence. A review of the Washington cases cited in the limitations decision, and in particular *Suter v. Wenatchee Water Power Co.*, supra, leaves this court in no doubt but that the Washington Supreme Court regards claims of the nature of those presented in these cases as being based on common law trespass on the case as distinguished from trespass *quare clausum fregit*. The *Suter* case has been cited and quoted many times by the Washington Supreme Court without a single instance of deviation from the language and rationale of that case in so far as the elements distinguishing trespass from an action on the case are concerned.

The Washington court holds that when the injury complained of is the immediate and direct result of defendant's acts or omissions, the action is for trespass whereas when the injury is consequential, the action is on the case. In *Suter v. Wenatchee Water Power Co.*,

supra, the injury was held consequential and the action on the case, even though flood waters, resulting in instantaneous damage, suddenly were precipitated from defendant's canal onto plaintiffs' farm lands. The negligence causing the damage occurred prior to the flooding in the construction and maintenance of the canal. The distinction drawn by the Washington court between immediate and consequential injury is based on the character of the acts or omissions causing the injury and on whether the injury results immediately upon the occurrence of the act or omission. In the present cases the injury to plaintiffs, if any, was of a non-intentional character occurring a considerable time following the failure or inability of defendant to completely eliminate the effluence of fluorides from its plants; accordingly, the injury was consequential rather than immediate and direct as those terms are interpreted by the Washington court in the law of trespass.

In an action on the case, it is necessary for plaintiff to allege and prove more than formal injury; but when trespass be proven, liability is absolute and at least nominal damage must be awarded. Even though it were assumed that solids in the form of minute particulates from defendant's plants have been deposited on plaintiffs' lands, the injury, if any, resulting therefrom was consequential, the action is on the case, and awards of nominal damages would not be justified by the facts or required by the law.

As for plaintiffs' alternative claim for relief grounded in nuisance, the Washington Supreme Court in *Riblet v.*

*Spokane-Portland Cement Co.*, supra, a case involving dust discharged from a cement plant, said at page 254:

> "Our basic point of inquiry relates to the general theory of the law of nuisance. This appears primarily to be based upon generally accepted ideas of right, equity, and justice. The thought is inherent that not even a fee simple owner has a totality of rights in and with respect to his real property. In so far as the law of nuisance is concerned, rights as to the usage of land are relative. The general legal principle to be inferred from court action in nuisance cases is that one landowner will not be permitted to use his land so unreasonably as to interfere unreasonably with another landowner's use and enjoyment of his land.
>
> The crux of the matter appears to be reasonableness. Admittedly, the term is a flexible one. It has many shades and varieties of meaning. In a nuisance case, the fundamental inquiry always appears to be whether the use of certain land can be considered as reasonable in relation to all the facts and surrounding circumstances."

It should be clear from the findings of fact and comments thereon previously made herein that the view of the evidence taken by the court does not warrant a finding that the operation of defendant's plants and resulting effluence therefrom constitutes an unreasonable interference with plaintiffs' use and enjoyment of their lands. The court is fully satisfied that the utility of defendant's plant operations and their importance to the economy and security of the nation far outweigh any injury to plaintiffs shown by the evidence. Consequently, neither a finding of nuisance nor granting of relief based thereon is justified.

The closing or curtailing of the operation of either of defendant's plants by injunction clearly is not warranted by the evidence under any theory.

Findings, conclusions and judgment in accordance herewith may be presented.

Dated at Tacoma, Washington, this 19th day of October, 1954.

GEO. H. BOLDT
George H. Boldt
United States District Judge

## Part II

### UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALBERT A. ARVIDSON, et al., *Appellants,*
vs.
REYNOLDS METALS COMPANY, a corporation, *Appellee.*

Aug. 17, 1956
No. 14,734

W. J. WHITEAKER, et al., *Appellants,*
vs.
REYNOLDS METALS COMPANY, a corporation, *Appellee.*

On appeals from the United States District Court for the Western District of Washington, Southern Division.

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Before: Bone and Orr, Circuit Judges
Murphy, District Judge

Per Curiam: The above cases coming on to be heard upon the record, the briefs of the parties, and the argument of counsel in open court, and it appearing that the findings of fact of the district court were not clearly erroneous, and that the judgments are sustained by substantial evidence, and that the conclusions of law of the district court were correctly drawn,

The judgment is affirmed, upon the opinion of the district court in 125 F. Supp. 481 (W. D. Wash. 1954).

(Endorsed:) Per Curiam Opinion. Filed Aug. 17, 1956.

Paul P. O'Brien, Clerk.

## Part III

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF WASHINGTON SOUTHERN DIVISION

| | |
|---|---|
| ALBERT A. ARVIDSON, CHERIE ARVIDSON, ANDY BAKER, BERNICE IRENE BAKER, S BRANDT, JOSEPHINE BRANDT, PETER DEPOE, ELLEN DEPOE, W. H. FORD, CLARA FORD, ADIN HESTER, ROSE HESTER, J. C. ISBISTER, MARY ISBISTER, LEE M. MILLER, DELLA B. MILLER, R. O. NORELIUS, IDA A. NORELIUS, J. S. ROBSON, LILLIE ROBSON, VERNON SEEKINS, HELEN SEEKINS, WILLIAM STAUFFER, MINNIE STAUFFER, Plaintiffs, | Civil No. 1415<br>OPINION<br>April 7, 1952 |

vs. )
)
REYNOLDS METALS COMPANY, )
a corporation, )
Defendant. )

JAMES ALGER FEE, District Judge:

Plaintiffs, in an action filed by them in The United States District Court for the Western District of Washington, Southern Division, allege that parcels of real property owned by them, respectively, situate in the State of Washington, have been trespassed upon by the defendant and seek damages because of injury thereto. The trespass was alleged to have been committed by means of gases, fumes, and particulate matter which physically invaded said lands and caused injury. It is alleged that the fumes, gases and particulate matter were emitted by an aluminum plant owned and operated by defendant and located in the State of Oregon.

The defendant has moved to transfer the cause to the District of Oregon on the ground of convenience of witnesses and parties under the terms of 28 U.S.C.A. § 1404(a).

Notwithstanding the broad terms of the statute, the transfer cannot be made for jurisdictional reasons:[1] first, the courts of the State of Oregon have no power to entertain or adjudicate trespasses upon real property situate in the State of Washington; second, no one of plain-

[1]Inherent in the mandate of § 1404(a), that the transferee forum be one where the action "might have been brought," are the requirements of jurisdiction of the subject matter and jurisdiction over the parties. Foster-Milburn Co. vs. Knight, 2 Cir., 181 F.2d 949.

tiffs has submitted himself to the jurisdiction of the courts of the State of Oregon or to the federal court there. Both of these propositions are fundamental, and either is fatal to the attempt of defendant to transfer the action.

It may well be that the law of some states, and perhaps of the majority, is that an interstate trespass can be prosecuted either in the state of origin or in the state of injury. But the courts of the State of Oregon hold that no jurisdiction in them subsists over a trespass upon land in another jurisdiction.[2] This doctrine is then binding upon the federal courts sitting in Oregon because of (1) the inherent character of the rule as purely local substantive law, (2) the holding that federal courts apply local substantive law,[3] and (3) because plaintiffs have chosen the forum where the land is situate. Hence, the United States District Court for the District of Oregon has no jurisdiction of the subject matter of the action.

Not only have plaintiffs chosen the Washington forum, but they are also not personally subject to the authority of any other court in any other state. This concept is fundamental to the inherent sovereignty of the separate states. It stems from the fact that a citizen of a state is entitled to relief in the courts thereof and not in some alien tribunal which may be thousands of

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[2]Montesano Lumber Co. vs. Portland Iron Works, 78 Oregon 53, 152 Pac. 244; Dippold vs. Cathlamet Timber Co., 98 Oregon 183, 193 Pac. 909. See O.C.L.A. 1-401.

[3]Erie Railroad Co. vs. Tompkins, 30 U.S. 64.

miles away at the behest of a foreign corporation.[4]

The statute in question is said to be an enactment based on the doctrine of forum non conveniens. But, under that doctrine, the cause was simply dismissed and no attempt was made to force a court of another jurisdiction to hear the cause. The purpose of the statute was to allow a transfer of a cause to a court where jurisdiction of the subject matter and of all litigants could both be obtained. Jurisdiction of the subject matter and jurisdiction of the persons litigant in the transferee court are both required by the statutory phrase, "might have been brought." Of course, an action can be brought anywhere. However, the words of the enactment cannot be rationalized to mean that an action "might have been brought" where neither jurisdiction of the subject matter nor jurisdiction of the persons litigant[5] is obtainable. The mere fact that the court to which transfer is attempted has general jurisdiction of the type suit pre-

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[4]See Gravely Motor Plow and Cultivator Co. vs. H. V. Carter Co., 9 Cir., 193 F.2d 158, 162.

The argument that, since requirements of jurisdiction over the person are imposed for the benefit of defendant, he can waive them, and plaintiff therefore should not be heard to argue, upon defendant's motion for transfer, that plaintiff is outside the jurisdiction of the transferee forum is too specious for consideration. Jurisdiction of the person is a requirement imposed for the benefit of all the parties litigant—plaintiff as well as defendant.

[5]In granting a petition for a writ of prohibition to prevent the transfer of an action, based on diversity of citizenship, because the transferee forum had no jurisdiction over the defendant, the Court of Appeals for the Second Circuit, speaking through Judge Learned Hand, in reference to §1404(a), arrives at the result by a simple process of statutory construction. Foster-Milburn Co. vs. Knight, 2 Cir., 181 F.2d 949, 952. While the reasoning there would be sufficient to dispose of this case, it is sound to decide upon the elements here actually involved.

sented does not confer authority to try a particular suit where these factors are lacking.

The original statute for removal was passed because of a feeling that the state courts might not be fair to a person from another state and particularly to a foreign corporation. Therefore, a federal tribunal was provided in the same state where justice could be done. Plaintiff, if he sue in a state court, cannot remove the cause to the federal court, nor remove it to a federal court of another jurisdiction.[6] Now it is claimed a plaintiff cannot choose a forum of his own state and remain there if a foreign corporation seek to drag him to a federal court where conditions are most favorable to it. Such a further distinction seems to unduly favor foreign corporations, whereas the modern tendency has been to limit or abolish diversity of citizenship jurisdiction created to favor them.

Under the forum non conveniens doctrine, it was assumed to be the obligation of the court to hear any cause within its jurisdiction unless the obstacles thereto were almost insuperable.[7] The doctrine of dismissal of the cause, under such circumstances, was distinctly predicated upon the existence of a forum where jurisdiction of the parties and of the subject matter was ob-

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[6]28 U.S.C.A. §1441(a); Shamrock Oil & Gas Corporation vs. Sheets, 313 U.S. 100; Glover Machine Works vs. Cooke Jellico Coal Co., 222 Fed. 531; Baker vs. Keebler, 29 F.Supp. 555.

[7]Cox vs. Pennsylvania Railroad Co., 72 F.Supp. 278; Mazinski vs. Dight, 99 F.Supp. 192. For excellent discussions of the doctrine, see 29 Columbia L. Rev. 1; 60 Harv. L. Rev. 908; 50 Yale L.J. 1234.

tainable in a new action filed there.[8] The factors that the cause of action arose and the parties resided in the other jurisdiction were also of great weight. It seems fair to say that, all other things being equal under the former state of affairs, this case would never have been dismissed under the forum non conveniens doctrine. But we do not place the decision on that ground, but on the ground of jurisdiction and the language of the statute.

Whatever the statute says, its terms are powerless to confer on an alien court jurisdiction of the subject matter and of the persons of litigants who have chosen their own tribunals.

The motion to transfer is denied.

## APPENDIX B

**Revised Code of Washington (R.C.W.):**

**4.16.080 Actions limited to three years.** Within three years: (1) An action for waste or trespass upon real property; (2) An action for taking, detaining or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated; (3) An action upon a contract or liability express or implied, which is not in writing, and does not arise out of any

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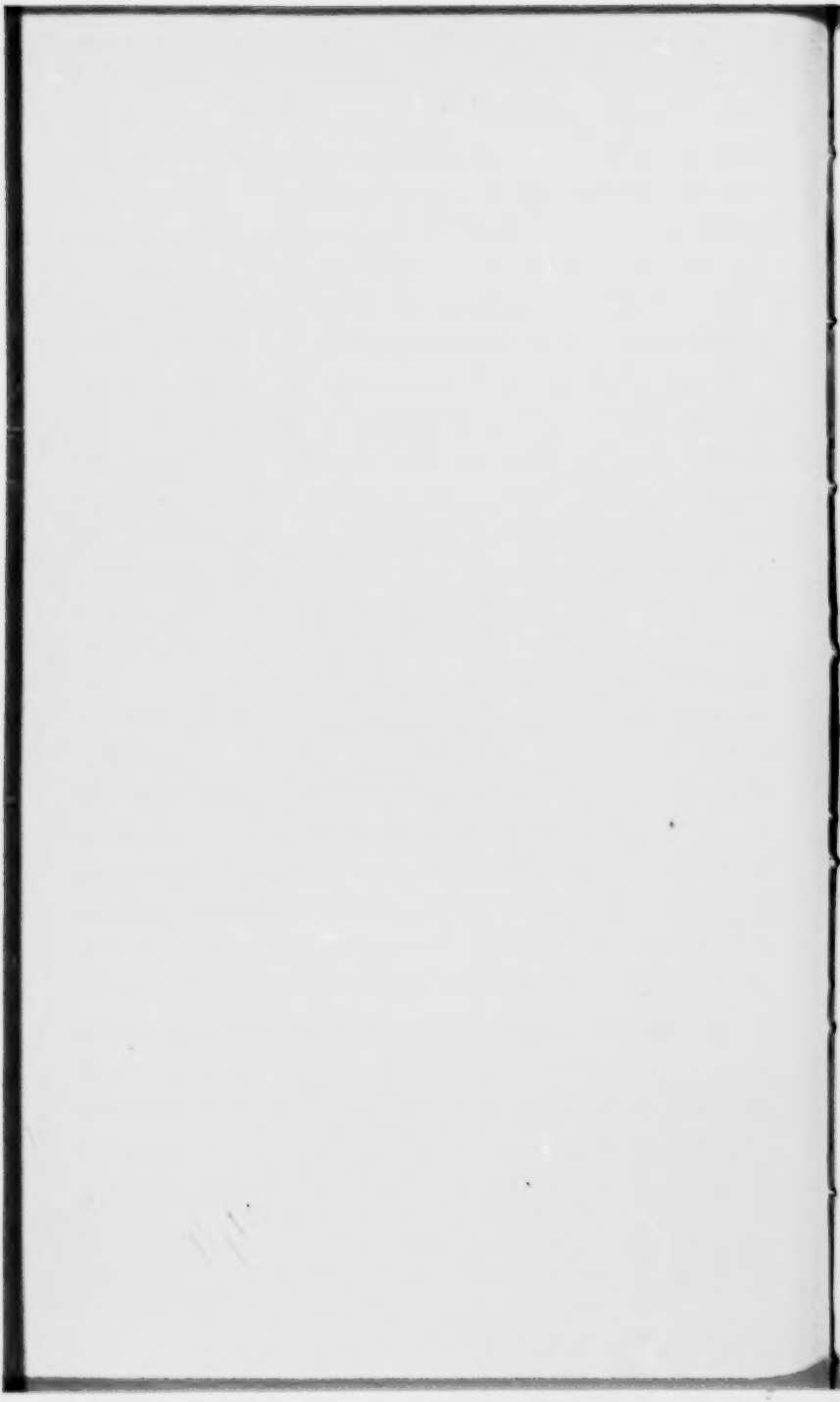
[8]29 Columbia L. Rev. 33-34; 50 Yale L.J. 1247. Explicit recognition of this requirement was given by the Supreme Court in Gulf Oil Corp. vs. Gilbert, 330 U.S. 501, 506-507: "In all cases in which the doctrine of forum non convenience comes into play, it presupposes at least two forums in which the defendant is amenable to process; * * *." It is also reiterated in Mazinski vs. Dight, 99 F. Supp. 192, 193.

written indictment; (4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the delivery by the aggrieved party of the facts constituting the fraud; (5) An action against a sheriff, constable or coroner upon a liability incurred by the doing of an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subdivision shall not apply to action for our escape; (6) An action against an officer charged with misappropriation or a failure to properly account for public funds intrusted to his custody, an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing is prescribed a different limitation: *Provided,* that the cause of action for such misappropriation, penalty or forfeiture shall not be deemed or have accrued until discovery by the aggrieved party of the act or acts from which such liability arises, and such liability shall exist and be enforceable for three years after discovery by the aggrieved party of the act or acts from which the liability arises; (7) An action for seduction and breach of promise to marry.

**4.16.130 Actions for relief not otherwise provided for.** An action for relief not herein otherwise provided for shall be commenced within two years after the cause of action accrued.



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JOHN T. FEY, Clerk

In the

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 575

ALBERT A. ARVIDSON, et al., *Petitioners,*

vs.

REYNOLDS METALS COMPANY, a corporation, *Respondent.*

W. J. WHITEAKER, et al., *Petitioners,*

vs.

REYNOLDS METALS COMPANY, a corporation, *Respondent.*

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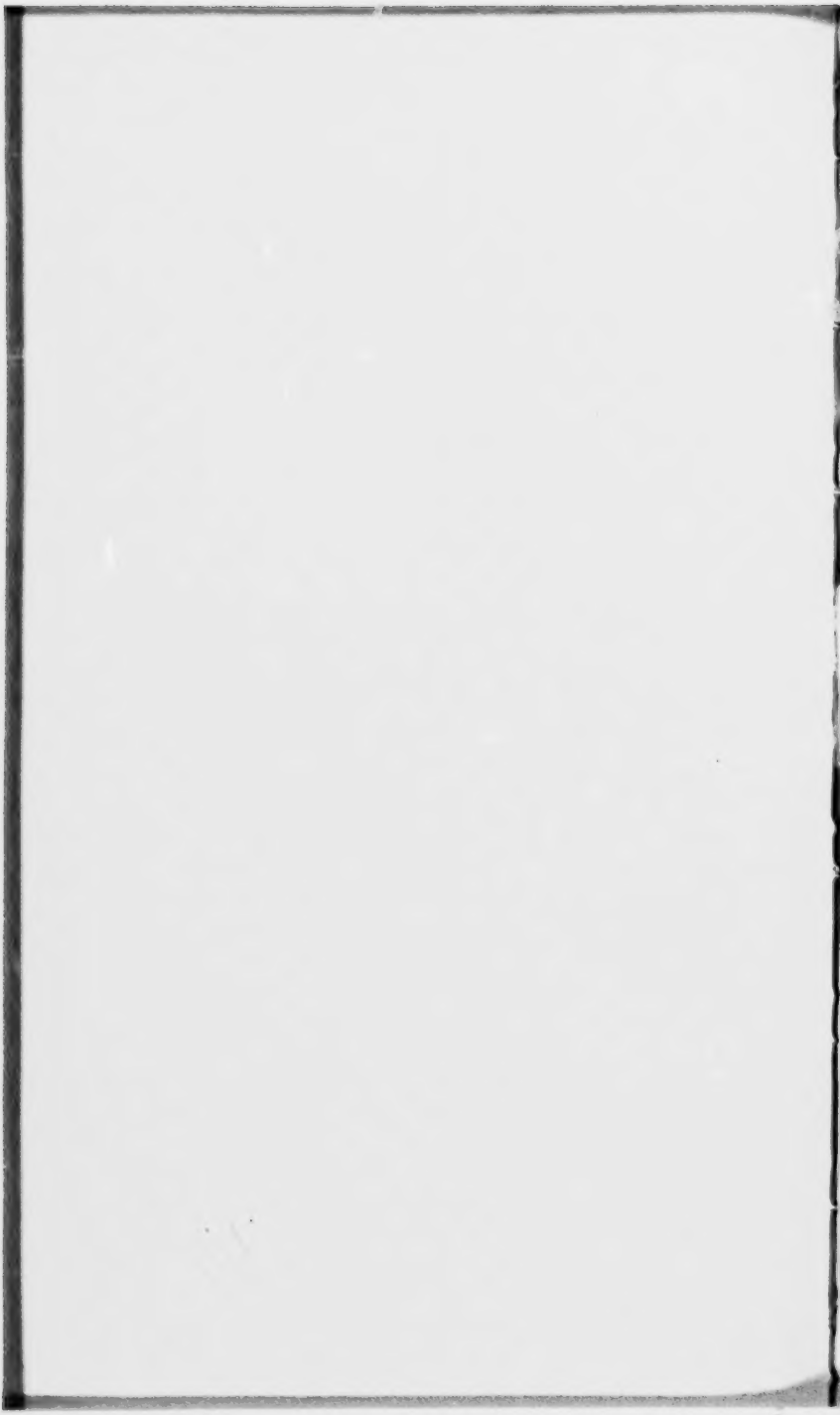

## SUBJECT INDEX


PAGE

Statement of the Cases ..... 2

Summary of Argument ..... 7

Argument ..... 8

I. In holding that the settling upon properties of solids emanating from an aluminum reduction plant does not give rise to a cause of action in trespass, the Court of Appeals for the Ninth Circuit did not decide a question of law in a way in conflict with the applicable law of the State of Washington ..... 8

II. Petitioners failed to establish by a preponderance of the evidence that fluorides in the form of solids settled upon their properties as a result of respondent's operations..... 24

III. In holding that petitioners' claims of injury to personalty were subject to a limitation period of two years, the Court of Appeals for the Ninth Circuit did not decide a question of law in a way in conflict with applicable law of the State of Washington ..... 29

IV. Petitioners failed to establish by a preponderance of the evidence that their cattle were injured as a result of respondent's operation of said plants ..... 35

Conclusion ..... 40

## TABLE OF CASES


PAGE

Allen v. Trust Company of Georgia (1946) 326 U. S. 630, 90 L. Ed. 367 ..... 25

Appeal of Beardsley (1910) 83 Conn. 34, 75 Atl. 141 ..... 19

Arvidson v. Reynolds Metals Co. (W.D. Wash., S. D., 1952) 107 F. Supp. 51 ..... 18

Arvidson v. Reynolds Metals Company (W.D. Wash., S. D., 1954) 125 F. Supp. 481 ..... 6, 8, 17, 27, 31, 37, 38, 39

Arvidson v. Reynolds Metals Company (CA 9, 1956) 236 F. (2d) 224 ..... 6, 9

Bartlett v. Grasselli Chemical Co. (1922) 92 W. Va. 445, 115 S.E. 451 ..... 11, 13

Bourne v. Wilson-Case Lumber Co. (1911) 58 Or. 48, 113 Pac. 52 ..... 13

Brown v. Jones (1929) 130 Or. 424, 278 Pac. 981, 8 R.C.L. 357 31

Chicago & E. Ill. R. Co. v. Collins Produce Company (1919) 249 U. S. 186, 63 L. Ed. 552 ..... 25

Clark Lloyd Lumber Co. v. Puget Sound & C. Ry. Co. (1916) 92 Wash. 601, 159 Pac. 774 ..... 20, 35

Columbian Carbon Co. v. Tholen (Tex., 1947) 199 S.W. (2d) 825 ..... 13

Constable v. John P. Duke (1927) 144 Wash. 263, 257 Pac. 637 35

Continental Ill., N.B. & T. Co. v. C., R.I., & P. R. Co. (1935) 294 U. S. 648, 79 L. Ed. 1110 ..... 25

Fraser v Aluminum Company of America (W. D. Wash., S. D., 1950) Civil No. 1223 ..... 17

General Talking Pictures Corporation v. Western Electric Company (1938) 304 U. S. 175, 82 L. Ed. 1273 ..... 25

Gray v. Harris & Son (1939) 200 Wash. 181, 93 P. (2d) 385.... 20

Houston Oil Company of Texas v. Goodrich (1918) 245 U. S. 440, 62 L. Ed. 385 ..... 24

Irwin v. J. K. Lumber Co. (1922) 119 Wash. 158, 205 Pac. 424 34

Kerr, et al, v. Reynolds Metals Co. (D. Or., 1950) Civil No. 4,123 ..... 23

TABLE OF CASES—(Cont'd.)


PAGE

Lindley v. Hyland (1943) 173 Or. 93, 144 P. (2d) 295 ..... 13

Luellen v. City of Aberdeen (1944) 20 Wash. (2d) 594, 148 P. (2d) 849 ..... 34

McCallister, et al, v. Reynolds Metals Co. (D. Or., 1950) Civil No. 4,418 ..... 23

Messinger v. Anderson (1912) 225 U. S. 436, 56 L. Ed. 1152.... 19

Nally v. Richmond (1922) 105 Or. 462, 209 Pac. 871 ..... 10

NLRB v. Pittsburgh Steamship Company (1951) 34 U. S. 498, 95 L. Ed. 479 ..... 24

Noble v. Martin (1937) 191 Wash. 38, 70 P. (2d) 1064..... 33

Northern Grain & Warehouse Co. v. Holst (1917) 95 Wash. 312, 162 Pac. 775 ..... 32

Northern Indiana Public Service Co. v. W. J. & M. S. Vesey (1936) 210 Ind. 338, 200 N.E. 620 ..... 13

Norwood v. Eastern Oregon Land Co. (1932) 139 Or. 25, 5 P. (2d) 1057, 7 P. (2d) 996 ..... 12

Page v. Arkansas Natural Gas Corporation (1932) 286 U. S. 269, 76 L. Ed. 1096 ..... 25

Park v. Northport Smelting & Refining Co. (1907) 47 Wash. 597, 92 Pac. 442 ..... 15

Perrin v. Aluminum Company of Am. & Thayer (W. D. Wash., S. D., 1950) Civil No. 1352 .....16, 30

Perrin v. Aluminum Company of America (CA 9, 1952) 197 F. (2d) 254 ..... 31

Polson Logging Co. v. United States (CCA 9, 1947) 160 F. (2d) 712 ..... 20

Riblet v. Spokane-Portland Cement Co. (1952) 41 Wash. (2d) 249, 248 P. (2d) 380 ..... 13

Sterrett v. Northport Mining & Smelting Co. (1902) 30 Wash. 164, 70 Pac. 266 ..... 15

Southern Power Company v. North Carolina Public Service Company (1924) 263 U. S. 508, 68 L. Ed. 413 ..... 24

TABLE OF CASES—(Cont'd.)

PAGE

Suter v. Wenatchee Water Power Co. (1904) 35 Wash. 1, 76 Pac. 298 ..... 12

Thackery v. Union Portland Cement Co. (1924) 64 Utah 437, 231 Pac. 813 ..... 10, 13

United States v. Fullard-Leo (CCA 9, 1946) 156 F. (2d) 756, affirmed (1946) 331 U. S. 256, 91 L. Ed. 1474 ..... 19

United States v. Ure (CA 9, 1955) 225 F. (2d) 709 ..... 22

Ure v. United States (D. Or., 1950) 93 F. Supp. 779 ..... 22

Welch v. Seattle & Montana R. Co. (1909) 56 Wash. 97, 105 Pac. 166 ..... 20

Weller v. Snoqualmie Falls Lumber Co. (1930) 155 Wash. 526, 285 Pac. 446 ..... 14

Whiteaker v. Reynolds Metals Co. (W. D. Wash., S. D., 1954) 125 F. Supp. 481 ..... 17

## TABLE OF TEXTBOOKS


PAGE

American Jurisprudence:

Vol. 39, Nuisances, Sec. 3, p. 282 ..... 12

Vol. 52, Trespass, p. 844 ..... 23

American Law Institute:

Vol. 1, Restatement of the Law of Torts, Sec. 158 ..... 22

Corpus Juris Secundum:

Vol. 21, Courts, Sec. 195c, p. 341 ..... 19

Vol. 53, Limitations of Actions, Sec. 27, p. 970 ..... 30

Vol. 87, Trespass, Sec. 13 ..... 23

High on Injunctions, (3rd ed., 1890) Sec. 739, p. 566..... 12

Joyce, Law of Nuisances, p. 27 ..... 12


## TABLE OF STATUTES


R.C.W. 4.16.080 (R.R.S., Section 159) .....8, 14, 30, 32, 33, 34

R.C.W. 4.16.130 (R.R.S. Section 165) ....5, 8, 14, 29, 31, 32, 33, 35


## RULES


Rule 19 Supreme Court of the United States Revised Rules 9, 24, 29

# In the Supreme Court of the United States

OCTOBER TERM, 1956

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No. 575

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ALBERT A. ARVIDSON, et al., *Petitioners,*

vs.

REYNOLDS METALS COMPANY, a corporation, *Respondent.*

W. J. WHITEAKER, et al., *Petitioners,*

vs.

REYNOLDS METALS COMPANY, a corporation, *Respondent.*

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## Respondent's Brief in Opposition To Petition for Writ of Certiorari

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**To the Honorable The Supreme Court of the United States:**

Respondent, through its counsel, in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, filed by petitioners, respectfully shows as follows:

## STATEMENT OF THE CASES

Because the Statement of the Cases set forth in petitioners' Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit (pp. 3-8) is argumentative and in order to correct omissions, the following statement is submitted to the court:

*Arvidson Action.* During 1941 and 1942, the Aluminum Company of America constructed the Troutdale, Oregon, aluminum reduction plant for the United States of America and operated the same under contract from May 20, 1942, to September 7, 1945. Said plant was not operated from September 7, 1945, to September 23, 1946. Respondent commenced operating said plant on September 23, 1946, and operated the same, as a lessee, continuously thereafter except for brief periods when operations were curtailed because of flood conditions and labor difficulties (R-I-14, 20).[1]

No fume control or collection system was present in the plant during the 3½ years it was operated by the Aluminum Company of America. Before respondent commenced operating the plant on September 23, 1946, respondent installed a fume collection system to precipitate a portion of the gases, fumes and particu-

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1 "R" as used herein refers to the transcript of record. The Roman numerals refer to the volume of the transcript. The Arabic numbers refer to the pages in the particular volume.

lates, including fluorides, otherwise passing through the vents in the roof. This system collected approximately 62 per cent of the fluorides which otherwise would have escaped from the plant. On or about June 1, 1949, respondent commenced the construction of a different system at said plant which was completed on or about November 3, 1950. The new system collects approximately 90 per cent of the fluorides which otherwise would escape from the plant (R-I-24-26).

December 6, 1950, the Arvidson petitioners filed a complaint in which they alleged that they resided near Camas and Washougal, in Clark County, Washington (across the Columbia River from the Troutdale plant), and that their personal and real properties situated in said area had been damaged as a result of respondent's operation of the Troutdale aluminum reduction plant (R-I-2-5, 112). The original 24 petitioners were engaged in dairy and/or beef operations. The parties stipulated in the pre-trial order (paragraphs XXI and XXII, R-I-52, 55) that the claims of five additional persons might be considered by the court. At the time that the trial commenced, therefore, 14 farms were involved. At the conclusion of petitioners' case the court, upon respondent's motion, dismissed the action as to plaintiffs Lee M. Miller and Della B. Miller for lack of evidence (R-IX-2559).

The Arvidson petitioners contended (1) that they were entitled to recover $200,000 in damages for alleged injuries to vegetation and animals and $350,000 in damages for alleged depreciation in the value of their real properties; and (2) that respondent should be enjoined from operating said plant until measures were taken to prevent the escape of fluorides therefrom (R-I-69, 71).

*Whiteaker Action.* During 1941 and 1942, respondent constructed the Longview aluminum reduction plant (R-I-140). Respondent commenced operating said plant in 1941 and operated the same continuously thereafter except for a period commencing on June 5, 1947, and ending on March 11, 1948, when operations ceased because of economic conditions (R-I-147-148).

Until 1946 said plant was operated without any fume collection devices. In 1946 and 1947 four vertical wash towers were installed at each potline building. In 1948 and 1949 four additional towers were installed at each potline building. These towers were designed to precipitate the gases, fumes and particulates otherwise emanating from said buildings (R-I-149-151).

November 12, 1952, the Whiteaker petitioners filed a complaint in which they alleged that they resided near Longview and Kelso, in Cowlitz County, Washington, and that their personal and real properties situated

in said area had been damaged as a result of respondent's operation of the Longview plant (R-I-118-121, 216). The ten petitioners were engaged in operating four dairy farms, three of which are situated south of Kelso, Washington. The other farm is west of the Longview plant (R-I-152-189).

The Whiteaker petitioners contended (1) that they were entitled to recover $150,000 in damages for alleged injuries to vegetation and animals and loss of profits and $175,000 in damages for alleged depreciation in the value of their real properties; and (2) that respondent should be enjoined from operating said plant until measures were taken to prevent the escape of fluorides therefrom (R-I-191, 193).

*Pre-Trial Proceedings.* August 31, 1953, the court ordered the Arvidson and Whiteaker actions consolidated for pre-trial and trial (R-I-216). Prior to trial, and after argument on the matter, the court held that petitioners' claims were subject to the two year limitation period set forth in R.C.W. 4.16.130 (R.R.S., Section 165) (R-I-96-97, 114, 217).

Pre-trial orders were settled prior to the commencement of trial (R-I-14, 140).

*Decision of Trial Court.* Following the trial of the two actions and on October 19, 1954, the trial court

filed a written opinion setting forth the court's conclusions concerning the issues presented in the actions (R-I-84-102; 125 F. Supp. 481).

The court found that respondent had not trespassed upon petitioners' properties. This was not, as petitioners state in their petition (pp. 8, 9), the principal point set forth in the opinion. The court also found that:

(1) Respondent's operation of the Troutdale and Longview aluminum reduction plants did not constitute a nuisance; and

(2) Petitioners were not entitled to injunctive relief.

Thereafter, findings of fact and conclusions of law and judgments were entered in the actions based upon the court's opinion (R-I-102-A-104, 208-A-210).

*Decision of Court of Appeals.* August 17, 1956, in affirming the judgments in a per curiam opinion, the Court of Appeals held that (236 F. (2d) 224):

1. The findings of fact of the District Court were not clearly erroneous;

2. The judgments are sustained by substantial evidence; and

3. The conclusions of law of the District Court were correctly drawn.

## SUMMARY OF ARGUMENT

Respondent summarizes its argument in opposition to the petition for a writ of certiorari as follows:

I

In holding that the settling upon properties of solids emanating from an aluminum reduction plant does not give rise to a cause of action in trespass, the Court of Appeals for the Ninth Circuit did not decide a question of law in a way in conflict with the applicable law of the State of Washington.

II

Petitioners failed to establish by a preponderance of the evidence that fluorides in the form of solids settled upon their properties as a result of respondent's operations.

III

In holding that petitioners' claims of injury to personalty were subject to a limitation period of two years, the Court of Appeals for the Ninth Circuit did not decide a question of law in a way in conflict with applicable law of the State of Washington.

IV

Petitioners failed to establish by a preponderance of the evidence that their cattle were injured as a result of respondent's operation of said plants.

## ARGUMENT

### I

**In holding that the settling upon properties of solids emanating from an aluminum reduction plant does not give rise to a cause of action in trespass, the Court of Appeals for the Ninth Circuit did not decide a question of law in a way in conflict with the applicable law of the State of Washington.**

Prior to the commencement of the trial, for the sake of convenience, counsel for petitioners and respondent requested the trial court to determine whether petitioners' claims as alleged in their complaints were subject to a two year limitation period (R.C.W. 4.16.130; R.R.S., Section 165) or a three year limitation period (R.C.W. 4.16.080; R.R.S., Section 159). After hearing argument on the matter, the court held that petitioners' claims were subject to the two year limitation period (R-I-96-97, 114, 217). In reaching this result, the court in effect held that the settling of solids on real property did not constitute a trespass. This results from the language in R.C.W. 4.16.080 (R.R.S., Section 159) providing for a three year limitation period "for waste or trespass upon real property."

The subject was considered by the trial court again in its written decision, and the same conclusion was arrived at (R-I-97-100; 125 F. Supp. 481).

Thereafter, the court entered conclusions of law in the Arvidson case which provided in part (R-I-102-E, 102-F):

> "II. A complaint which alleges that gases, fumes and particulates from an aluminum reduction plant settling upon properties in the vicinity of said plant have caused damage to the owners or occupants of said properties sounds in trespass on the case, and not trespass, under the substantive law of the state of Washington. * * *
>
> "IV. Defendant did not trespass upon plaintiffs' properties from December 7, 1948, to November 4, 1953, because under the substantive law of the State of Washington the settling of gaseous and particulate fluorides from an aluminum reduction plant upon surrounding properties does not result in a trespass.
>
> "V. The two year period of limitation provided for under R.C.W. 4.16.130 (Rem. Rev. Stat. 165) is applicable to plaintiffs' claims for damages to real and personal property."

and similar conclusions of law in the Whiteaker case (R-I-208-C, 208-D).

The Court of Appeals for the Ninth Circuit held that the foregoing conclusions of law were correctly drawn (236 F. (2d) 224).

Apparently relying upon Section 1 (b) of Rule 19 of Supreme Court of the United States Revised Rules, petitioners contend in their petition (p. 9) that the foregoing conclusions that the settling upon real prop-

erty situate in the State of Washington of solids[2] emanating from an industrial plant does not give rise to a cause of action in trespass are decisions of an important state question in conflict with applicable state law. This contention is not well founded.

The gist of the action in trespass is breaking and entering upon the real property of the plaintiff. Plaintiff must plead and prove a wrongful entry upon the premises.

> *Nally v. Richmond* (1922) 105 Or. 462, 470, 209 Pac. 871, 874

This requirement is vital and is not satisfied by a showing that particulates or solids emanating from an industrial plant settled upon the plaintiff's lands.

> *Thackery v. Union Portland Cement Co.* (1924) 64 Utah 437, 231 Pac. 813, 814
>
> "The basis of respondent's claim for damages is injury caused by the appellant in operating its cement plant, and by permitting small particles of cement, dust, and smoke to escape and pass from the appellant's plant and to fall upon respondent's premises. Statements in the complaint claim injury

---

2 In their complaints, petitioners alleged that "gases, fumes and particulates" were deposited upon their properties. In their petition, however, petitioners refer to the depositing of "solids." For the purpose of this brief it has been assumed that petitioners regard "solids" and "particulates" as being synonymous.

to grown and growing crops and to hay stored on the premises, and that the dust and smoke rendered the place undesirable for a home for respondent and his family, thereby depreciating the value of said premises and damaging the crops grown and growing thereon and the livestock fed upon the premises.

* * *

"Subdivision 2, § 6468, Comp. Laws Utah 1917, is relied upon by appellant. That subdivision is as follows: 'An action for waste or trespass of real property must be commenced within three years.'

"The acts of appellant were in no sense a trespass upon the premises of respondent as the term 'trespass' has been interpreted by this court in *O'Neill v. Railroad*, 38 Utah, 475, 114 P. 127. The court in that case was considering the subdivision just quoted. It is not claimed that appellant by any act entered upon the close of the respondent or in any way interfered with the physical occupancy of the premises by the respondent."

*Bartlett v. Grasselli Chemical Co.* (1922) 92 W. Va. 445, 115 S.E. 451

Plaintiff, a farmer, sought to recover damages for injury to the agricultural, residential and market values of his farm caused by fumes, gases and dust emanating from defendant's zinc reduction plant. Plaintiff contended that the effluents from the plant were deleterious and fatal to livestock grazing upon vegetation upon which such effluents were deposited. In reversing judgment for plaintiff, the court stated on page 455:

"The injury in respect of which this action was brought is consequential and flows from a purely private nuisance. There has been no trespass upon the plaintiff's lands. The furnaces and business working the injury are located and conducted upon the defendant's own land."

*39 Am. Jur., Nuisances, Section 3*, page 282

Furthermore, the injuries complained of as resulting from the asserted trespass must have been the direct and immediate result of the defendant's acts and omissions.

*Suter v. Wenatchee Water Power Co.* (1904) 35 Wash. 1, 76 Pac. 298, 300

*Norwood v. Eastern Oregon Land Co.* (1932) 139 Or. 25, 37, 5 P. (2d) 1057, 1061, 7 P. (2d) 996

Where, instead, the injury is consequential and results from some act committed beyond the limits of the property affected, plaintiff's cause of action sounds in trespass on the case (nuisance) and not in trespass.

*Joyce, Law of Nuisances* (1906) page 27

*High on Injunctions* (3rd ed., 1890) Section 739, page 566

Applying the foregoing criteria, the courts have held that the settling upon real property of industrial

effluents (such as soot, dirt, carbon black, ashes and cinders) does not result in a trespass.

*Northern Indiana Public Service Co. v. W. J. & M. S.* Vesey (1936) 210 Ind. 338, 200 N. E. 620, 627 (soot and dirt from gas plant)

*Columbian Carbon Co. v. Tholen* (Tex., 1947) 199 S. W. (2d) 825 (carbon black and soot from carbon black plant)

*Bourne v. Wilson-Case Lumber Co.* (1911) 58 Or. 48, 51, 113 Pac. 52 (ashes, cinders and sawdust)

*Lindley v. Hyland* (1943) 173 Or. 93, 144 P. (2d) 295 (shavings and sawdust from planing mill)

*Thackery v. Union Portland Cement Co.*, supra, page 10 (cement dust)

*Bartlett v. Grasselli Chemical Co.*, supra, page 11 dust from zinc reduction plant)

The Washington Supreme Court has concluded similarly.

*Riblet v. Spokane-Portland Cement Co.* (1952) 41 Wash. (2d) 249, 248 P. (2d) 380

Plaintiffs sought to recover for damages to their residential property caused by cement dust cast thereupon as a result of the operation of a cement manufacturing plant by defendant. The trial court dismissed the case on the ground that the evidence was insufficient to support a cause of action. In reversing judg-

ment for defendant, the Washington Supreme Court held that the evidence was sufficient to support a cause of action based upon nuisance and that the plaintiff's claims were subject to the two year statute of limitations (R.C.W. 4.16.130) and not the three year statute of limitations (R.C.W. 4.16.080). The court thus in effect held that activity such as that complained of sounded in nuisance and not trespass.

*Weller v. Snoqualmie Falls Lumber Co.* (1930) 155 Wash. 526, 285 Pac. 446

In considering the statute of limitations applicable to an action to recover for injury from cinders, soot, ashes and charred materials carried by prevailing winds from defendant's sawmill to plaintiffs' property, the court stated on page 448:

> " * * * It was the operation of the sawmills that caused the damage. The injury to the farm was in the nature of a continuing nuisance, and as stated in *Island Lime Co. v. Seattle*, 122 Wash. 632, 211 P. 285, 286: 'We are firmly committed to the rule that one suffering from an injury in the nature of a continuing nuisance may recover damages as often as he brings action therefor. * * * ' "

Petitioners seek to avoid the effect of this holding by arguing (p. 14) that the case was "pleaded in nuisance." This statement is not supported by the record.

*Park v. Northport Smelting & Refining Co.* (1907) 47 Wash. 597, 92 Pac. 442

Plaintiff sought damages for the destruction of growing trees by reason of fumes and smoke from defendant's smelter. The court permitted recovery for damages accruing within two years prior to the commencement of the action, and not within the three year period which the statute of limitations provides for trespass to real property.

*Sterrett v. Northport Mining & Smelting Co.* (1902) 30 Wash. 164, 70 Pac. 266

Plaintiff sought to recover for damages to his lands, plants and trees caused by the precipitation of fumes and smoke from defendant's smelter. The court stated on page 270:

> " * * * It is lawful to operate a smelter. No one has a right, however, to pursue a lawful business, if thereby he injures his neighbor, without compensating such for the damages actually sustained. This action may be sustained also on the grounds of a continuing nuisance. *Doran v. City of Seattle*, 24 Wash. 182, 64 Pac. 230, 54 L. R. A. 532, 85 Am. St. Rep. 948."

The same result has been reached when the effluents complained of have been solids emanating from an aluminum reduction plant.

*Perrin v. Aluminum Company of Am. & Thayer*
(W. D. Wash., S. D., 1950) Civil No. 1352

Plaintiffs filed an action in June, 1950, in the Superior Court of the State of Washington for Clark County to recover damages for injuries to gladiolus bulb operations conducted by plaintiffs on leased property in Oregon during the 1947 growing season. Plaintiffs did not characterize defendant's operation of its Vancouver aluminum plant as a nuisance, and referred in their complaint to the trespass statutes of the State of Oregon. After removal to the United States District Court, defendant moved to dismiss the action on the ground that the pleadings disclosed that the action was barred by the statute of limitations. When the matter came on for hearing before Judge Charles Leavy on November 20, 1950, he allowed said motion on the ground that the three year statute of limitations relating to trespass on real property and injuries to personal property was not applicable because no trespass had occurred. He stated in part:

> "The Court found in the Fraser case, and I see no reason why I should reverse that position in this case, that the activity itself was a perfectly legitimate and lawful activity, in constructing this aluminum plant to engage in reducing alumina to aluminum; the fumes carried by winds to the land of this plaintiff and others were consequential rather than purposeful and were incidental rather

than intended; and that made the case, in my mind, one of trespass on the case."

The Fraser case to which Judge Leavy referred was

*Fraser v. Aluminum Company of America* (W. D. Wash., S. D., 1950) Civil No. 1223.

*Albert A. Arvidson, et al, v. Reynolds Metals Co.* (W. D. Wash., S. D., 1954) 125 F. Supp. 481, 487-488

*W. J. Whiteaker, et al, v. Reynolds Metals Co.* (W. D. Wash., S. D., 1954) 125 F. Supp. 481, 487-488

The trial judge here, in an opinion dated October 19, 1954, considered the portent of the decisions of the Washington courts in holding plaintiffs' claim did not sound in trespass:

> "A review of the Washington cases cited in the limitations decision, and in particular *Suter v. Wenatchee Water Power Co.*, supra, leaves this court in no doubt but that the Washington Supreme Court regards claims of the nature of those presented in these cases as being based on common law trespass on the case as distinguished from trespass quare clausum fregit. * * *
>
> "The Washington court holds that when the injury complained of is the immediate and direct result of defendant's acts or omissions, the action is for trespass whereas when the injury is consequential, the action is on the case. * * * The distinction drawn by the Washington court between immediate and consequential injury is based on the character of the acts or omissions causing the injury and on whether the injury results immediately

upon the occurrence of the act or omission. In the present cases the injury to plaintiffs, if any, was of a nonintentional character occuring a considerable time following the failure of *[or]* inability of defendant to completely eliminate the effluence of fluorides from its plants; accordingly, the injury was consequential rather than immediate and direct as those terms are interpreted by the Washington court in the law of trespass."

The authorities cited by petitioners (pp. 14-22) are not in conflict with the authorities to which reference has just been made. Petitioners rely (p. 14) upon certain remarks by the Honorable James Alger Fee in denying a motion to transfer the *Arvidson* action to the United States District Court for the District of Oregon (reported at 107 F. Supp. 51). Concerning this language, the trial court stated (R-I-96):

"Early in the proceedings the removal of the actions to the Oregon District Court on the ground of *forum non conveniens* was sought by defendant. The matter was extensively briefed and argued before then District Judge James Alger Fee sitting in this court by assignment. In an opinion reported at 107 Fed. Sup. 51, Judge Fee, on the allegations of the complaints and upon the oral statements of plaintiffs' counsel during the hearing on the motion for removal, for the limited purposes of that motion accepted plaintiffs' contention that the actions sounded in trespass. Removal was denied for several reasons but principally because under Oregon Supreme Court decisions that court has held itself without jurisdiction to deal with actions for trespass

> on lands outside of Oregon. There is no indication in Judge Fee's opinion or elsewhere in the record that consideration was given to the Washington law as to whether actions of the nature of the present cases sound in trespass rather than trespass on the case. Washington law was neither directly nor indirectly considered, stated or applied in the removal decision. The parties agree that under *Erie R. C. v. Tompkins*, 305 U.S. 673, on substantive issues the cases must be decided according to Washington law."

Petitioners contend in their brief (p. 15) that Judge Fee's remarks on trespass became the "law of the case." This is not so. The doctrine of the law of the case is a rule of practice and not a principle of substantive law.

> *Messinger v. Anderson* (1912) 225 U. S. 436, 443, 56 L. Ed. 1152, 1156
>
> *United States v. Fullard-Leo* (CCA 9, 1946) 156 F. (2d) 756, 757; affirmed (1946) 331 U. S. 256, 91 L. Ed. 1474

The judge before whom later proceedings are had in a case is not absolutely bound to follow the rulings of the judge before whom the earlier proceedings were had.

> *Appeal of Beardsley* (1910) 83 Conn. 34, 75 Atl. 141, 142
>
> *21 C.J.S. Courts, Section 195c*, p. 341

An interlocutory order which merely decides some point or matter essential to the progress of the case, and collateral to the issues therein, is not binding as the law of the case.

*Polson Logging Co. v. United States* (CCA 9, 1947) 160 F. (2d) 712

The case of *Welch v. Seattle & Montana R. Co.* (1909) 56 Wash. 97, 105 Pac. 166,) is cited by petitioners (pp. 16-17) as demonstrating that "damages are presumed from the breaking of the close." This may be true. However, petitioners have failed to demonstrate in these actions that as a matter of law the close has been broken. In fact, the authorities previously cited show that the contrary is true (supra, pp. 16-17).

The next case cited by petitioners (pp. 17-18), *Gray v. Harris & Son* (1939) 200 Wash. 181, 93 P. (2d) 385, is in support of the proposition that, "if defendant breaks the close, liability is absolute." However, as a matter of law, the close is not broken by the settling of solids from an aluminum plant upon real properties.

The case of *Clark Lloyd Lumber Co. v. Puget Sound & C. Ry. Co.* (1916) 92 Wash. 601, 159 Pac. 774, is cited (p. 18) as indicating that "the deposit of solids presently invades a property right whenever the damage was done, and irrespective of the amount of dam-

age." There, the court held that defendant's blasting of stumps to which plaintiff's boom was anchored and the casting of waste, rock and dirt into a cove constituted a trespass subject to the three year period of limitations. After noting the difference between a lawful act resulting in a consequential injury and an unlawful act resulting in an immediate injury, the court held that the activity complained of resulted in an immediate injury and was wrongful in its inception because it violated an agreement between the parties (p. 776):

> "The blasting of the stumps and the waste of the debris over the bank and into the cove was an immediate injury. The damages which may result do not have to be immediate to sustain an action under section 159. The statute does not concern itself with the moment of time when the damage actually accrues or the amount of the damage. They may continue and grow in volume. It concerns itself only with the character of the trespass. If a thing lawful to be done results in damage, the case falls under the two-year statute. If the thing done is wrongful in its inception to the extent that it presently invades a property right, the three-year statute applies. * * *
>
> "In the instant case, appellant did not have 'a lawful right to construct as it chose.' Its rights are defined in the contract which clearly implies the preservation of respondent's property for the uses intended, as well as its own right to build its railroad. In the Suter Case, no damage would have resulted from the primary act of building the canal. The damage complained of was the result of its after negligence in filling the canal beyond its

> capacity. But here the damage, if any, came from a physical act touching the property of respondent, and theoretically, at least, was a damage in its inception."

Here, respondent has been engaged in the legitimate activity of reducing aluminum. The alleged deleterious effects of this activity are consequential and not immediate.

Petitioners rely (p. 19) upon the rule set forth in *1 American Law Institute, Restatement of the Law of Torts (1934) Section 158*. The illustrations to said rule indicate that the rule was not intended to apply to an indirect invasion resulting as a consequence of lawful acts such as the deposit of effluents upon property in the vicinity of an industrial plant.

Petitioners also cite (p. 20) the case of *Ure v. United States* (D. Or., 1950) 93 F. Supp. 779, which involved flooding caused by the breaking of an irrigation canal. The decision indicated (p. 790) that the court was applying the law of trespass as developed by courts in the State of Oregon, and not the law of the State of Washington, which has previously been set forth. Furthermore, the judgment was not affirmed on appeal as petitioners state (p. 20). Instead, the judgment was reversed by the Appellate Court.

*United States v. Ure* (CA 9, 1955) 225 F. (2d) 709

The cases of *Kerr, et al, v. Reynolds Metals Co.* (D. Or., 1950) Civil No. 4,123, and *McCallister, et al, v. Reynolds Metals Co.* (D. Or., 1950) Civil No. 4,418, which petitioners also rely upon (pp. 20-21) are likewise of no assistance. In the remarks which he made in denying defendant's motion for an involuntary nonsuit, Judge Fee made no effort to distinguish between the law of trespass as developed by the courts of the State of Oregon and as developed by the courts of the State of Washington. Thereafter, Judge Fee stated in a written opinion dated December 11, 1950 (p. 5), that, if he accepted petitioners' theory that the actions were at law for trespass, he could not award damages to the Washington petitioners because of lack of jurisdiction. He, therefore, did not expressly determine what the Washington law on this point was.

The citations (pp. 21-22) to *87 C.J.S., Trespass, Section 13, and 52 Am. Jur., Trespass*, p. 844, are likewise of no value. There is no indication that the rules stated therein are to be applied to the settling upon real properties of minute materials emanating from an industrial plant being lawfully operated.

II

**Petitioners failed to establish by a preponderance of the evidence that flourides in the form of solids settled upon their properties as a result of respondent's operations.**

On pages 22 to 36, inclusive, of their petition, petitioners argue that the evidence introduced by them at the trial showed that fluorides in the form of solids were deposited upon their properties. This argument, of course, involves a matter of fact and not a matter of law. Petitioners have not indicated in their petition upon which of the considerations governing review on certiorari they are relying in making this argument.

Granting of a writ of certiorari to a United States Court of Appeals is a matter of sound judicial discretion.

> Rule 19 (1) (b) of the Revised Rules of the Supreme Court of the United States (Formerly Rule 38 (5) (b))

In exercising its discretion, this court has stated consistently the impropriety of the use of the writ to secure review of questions of fact.

> *NLRB v. Pittsburgh Steamship Company* (1951) 34 U.S. 498, 502-503, 95 L. Ed. 479, 482-483
>
> *Houston Oil Company of Texas v. Goodrich* (1918) 245 U.S. 440, 441, 62 L. Ed. 385
>
> *Southern Power Company v. North Carolina Public Service Company* (1924) 263 U.S. 508, 509, 68 L. Ed. 413

The policy to decline review of questions of fact is particularly compelling when the findings of fact, as in the cases at bar, have been concurred in by both the district court and the court of appeals.

*General Talking Pictures Corporation v. Western Electric Company* (1938) 304 U.S. 175, 178, 82 L. Ed. 1273, 1275

Even where Supreme Court review might otherwise be justified, concurrent findings of fact will not be reviewed.

*Allen v. Trust Company of Georgia* (1946) 326 U. S. 630, 636, 90 L. Ed. 367, 370

*Page v. Arkansas Natural Gas Corporation* (1932) 286 U. S. 269, 271, 76 L. Ed. 1096, 1098

*Chicago & E. Ill. R. Co. v. Collins Produce Company* (1919) 249 U. S. 186, 192, 63 L. Ed. 552, 555

Such concurrent findings have been held "conclusive unless clearly erroneous."

*Continental Ill., N. B. & T. Co. v. C., R.I., & P. R. Co.* (1935) 294 U. S. 648, 678, 79 L. Ed. 1110, 1129

The concurrent findings concerning the settling of solids upon petitioners' properties were not "clearly erroneous."

Fluorides are used in the production of aluminum (R-III-32). "Fluorides" result from the combination of fluorine with other chemical elements. Fluorides are in the form of gases, liquids or solids (R-I-55, 189). Some fluorides escape from the aluminum reduction plants operated by respondent at Troutdale and Longview. Pure fluorine has never escaped from said plants (R-I-55, 189; III-33). Petitioners contend that the proof in these actions shows that fluorides in particulate or solid form (as distinguished from gaseous fluorides) emanating from said plants settled upon petitioners' properties during the period for which damages are sought.

The trial court recognized that petitioners failed to establish this fact by a preponderance of the evidence. Because of the state of the evidence on this point, the trial court was unable to determine not only the *character*, but also the *amount*, if any, of the fluorine in the forage growing on the property of petitioners which was attributable to respondent's operations. The trial court's comment on this phase of the actions as set forth in the written decision was as follows (R-I-92):

> "A fair inference from a full consideration of the evidence on this phase of the case is that some part of the fluorine found in the forage at points within the vicinity of plaintiffs' farms during the period in question in these cases is attributable to fluorides escaping from defendant's plants, but the amount

*and character thereof* is a matter of speculation and cannot be determined with any degree of certainty. In all probability some areas in the near vicinity of the plants receive deposits of particulates or solids in a minute and powdery form so fine as not to be observable even by scientific methods. *There is no evidence in the record indicating that direct observation of solid deposits have been made on plaintiff farms or at any other place as distant from the plants as the nearest of plaintiffs' farms.*

"A further factor complicating the matter is the necessity of using test data from samples gathered at more or less infrequent intervals at scattered points and attempting to draw inferences from *averages* of such data as to particular properties not precisely at a sampling station. It is apparent from the data itself that rather wide variations occur geographically climatically and by season. When all of these matters are considered it can be seen that *any specific finding of fluorine content in forage on the particular property of any plaintiff must very largely if not wholly be a matter of speculation and conjecture.*" (Emphasis added)

It should be remembered that the court viewed petitioners' properties (125 F. Supp. 482).

The trial court entered a finding in the Arvidson action which provided as follows (R-I-102-C):

"All forage contains some fluorine. The court is not able to determine the amount of the fluorine, if any, in the forage growing on plaintiffs' farms which was attributable to the settling upon said

> farms between December 7, 1948, and November 4, 1953, of fluorides escaping from defendant's Troutdale aluminum reduction plant."

and a conclusion based upon such finding that (R-I-102-F):

> "Plaintiffs did not sustain the burden of producing a preponderance of credible evidence to establish * * * (b) substantial fluorine contents in forage attributable to effluents from defendant's plants; * * *."

The court entered a similar finding in the Whiteaker action (R-I-208-B) and a similar conclusion (R-I-208-D).

Comparison of the relevant portions of the opinion with the findings and conclusions set forth above does not indicate any inconsistency or contradiction such as petitioners claim exists (pp. 22-23).

In view of the rules of law applicable to this matter and the foregoing findings of fact and conclusions of law of the trial court, as confirmed by the Court of Appeals, no detailed review of the evidence on this point is necessary.

III

**In holding that petitioners' claims of injury to personalty were subject to a limitation period of two years, the Court of Appeals for the Ninth Circuit did not decide a question of law in a way in conflict with applicable law of the State of Washington.**

On pages 36 to 41, inclusive, of their petition, petitioners argue that the *trial court* erred in holding that petitioners' claims for asserted injury to personal property were subject to a two year limitation period. Petitioners do not specify upon which of the considerations governing review on certiorari specified in Section 1 (b) of Rule 19 of Supreme Court of the United States Revised Rules said argument is based. Presumably, however, they believe that the Court of Appeals' decision as to the proper limitation period conflicts with applicable law of the State of Washington.

The two year limitation period which the trial court and the Court of Appeals held applicable to petitioners' claims for asserted injury to personalty is set forth in *R.C.W. 4.16.130 (R.R.S., Section 165)* and provides as follows:

> "An action for relief not herein otherwise provided for shall be commenced within two years after the cause of action accrued."

Petitioners contend (p. 39) that the underlined portion of *R.C.W. 4.16.080 (R.R.S., Section 159)* applies to their claims for asserted injury to personalty:

> "(2) *An action for taking, detaining, or injuring personal property*, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated; * * *." (Emphasis added)

A contention similar to that being made here by petitioners was rejected by the same lower court in 1950. In *Perrin v. Aluminum Company of Am. & Thayer*, supra, page 16, plaintiffs filed an action in the United States District Court for the Western District of Washington, Southern Division, in June, 1950, to recover damages for injuries to gladiolus bulb operations conducted by plaintiffs on leased property in Oregon during 1947. Plaintiffs claimed that the asserted injuries were caused by fluorides emanating from an aluminum reduction plant. Inasmuch as the action had been instituted in the State of Washington, the law of that jurisdiction determined the applicable limitation period.

*53 C.J.S., Limitations of Actions, Section 27*, p. 970

The court (Leavy, J.) allowed a motion to dismiss the action as barred by R.C.W. 4.16.130 (R.R.S., Section 165). See:

*Perrin v. Aluminum Company of America* (CA 9, 1952) 197 F. (2d) 254

The claims involved asserted injury to personalty inasmuch as crops growing on leased land are considered as personalty.

*Brown v. Jones* (1929) 130 Or. 424, 433, 278 Pac. 981, 8 R.C.L. 357

The *Perrin* decision was referred to by the trial court here in holding the two year limitation period to be applicable (125 F. Supp. 487):

> "I am fully satisfied that under the allegations in the pleadings of the above cases the two-year limitation provided for under RCW 4.16.130 (Rem. § 165) must be applied to the claims for damages both to real and personal property. This conclusion seems inescapable under the following decisions construing subdivision (1) of RCW 4.16.080 (Rem. § 159): * * * and the following decisions construing subdivision (2): *Northern Grain & Warehouse Co. v. Holst*, 95 Wash. 312, 163 P. 775; *Clark Lloyd Lumber Co. v. Puget Sound & Cascade Ry. Co.*, 92 Wash. 601, 159 P. 774; *Irwin v. J. K. Lumber Co.*, 119 Wash. 158, 205 P. 424; *Constable v. Duke*, 144 Wash. 263, 257 P. 637; *Noble v. Martin*, 191 Wash. 39, 70 P. 2d 1064; *Luellen v. [City of] Aberdeen*, 20 Wash. 2d 594, 148 P. 2d 849. The conclusion above stated was reached entirely without regard to the

fact that Judge Leavy held likewise in *Perrin v. Aluminum Company of America and Thayer* (W.D. Wash., S.D., 1950)."

Petitioners seek to avoid the above holdings by contending that

(1) The words "for any other injury to the person or rights of another not hereinafter enumerated" appearing in subdivision 2 of R.C.W. 4.16.080 (R.R.S., Section 159) apply to "direct" invasions or acts;

(2) R.C.W. 4.16.130 (R.R.S., Section 165) applies to "indirect" invasions or acts; and

(3) The words "An action for * * * injuring personal property" appearing in subdivision 2 of R.C.W. 4.16.080 (R.R.S., Section 159) apply to "direct" and "indirect" injuries to personalty.

Respondent concedes the correctness of the first and second of petitioners' contentions. However, the third contention is not a correct statement of Washington law. No portion of subdivision 2 of R.C.W. 4.16.080 (R.R.S., Section 159) is applicable where an "indirect" invasion or act has occurred.

*Northern Grain & Warehouse Co. v. Holst* (1917) 95 Wash. 312, 163 Pac. 775

Here, the court held that the two year statute of limitations applied in an action to recover damages suffered by plaintiff because defendants failed to ob-

tain a bond from a defaulting warehouseman. In response to plaintiff's contention that R.R.S., Section 159 (2) (R.C.W. 4.16.080), applied and not R.R.S., Section 165 (R.C.W. 4.16.130), the court stated on page 777:

> "* * * *we must read subdivision 2 as applying only to certain direct invasions of personal or property rights not otherwise 'hereinafter enumerated,'* and as not including those numerous causes of action recognized by the law, among which must be included the one here pleaded if existing at all where the law imposes a liability because of indirection or default. The cause of action here pleaded is indirectly based upon the failure of public officials to perform duties imposed by law. It is not based upon any *direct act* of these officials injuring appellant's *personal property* or property rights." (Emphasis added)

*Noble v. Martin* (1937) 191 Wash. 38, 70 P. (2d) 1064, 1068

> "The suggestion that the action falls within subdivision 2 of section 159 is equally untenable. This subdivision provides as follows: 'An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated.'
>
> "It was clearly and definitely held in *Northern Grain & Warehouse Company v. Holst*, 95 Wash. 312, 163 P. 775, that *this statutory subdivision applies only to certain direct invasions of personal or property rights.* Approval of that decision was later expressed in *Constable v. Duke*, 144 Wash. 263, 257 P. 637, and *it must be regarded as stating the settled law of the state.*"

*Luellen v. City of Aberdeen* (1944) 20 Wash. (2d) 594, 148 P. (2d) 849

Plaintiff sought an adjudication that his removal as police captain was illegal. The court held (p. 855) that the action was subject to the three year period of limitations set forth in R.C.W. 4.16.080 (2) (R.R.S., Section 159 (2)) because of a *direct* invasion of an *intangible* property right. There is no similarity between the facts in that case and those in the case at bar. Furthermore, the personal property allegedly injured here is *tangible*, and not intangible.

*Irwin v. J. K. Lumber Co.* (1922) 119 Wash. 158, 205 Pac. 424

Plaintiff sought to recover for damages suffered when defendants constructed a trestle and booming ground in the Columbia River destroying the value of the same for plaintiff's licensed fishing operations. The court held the action to be barred by the three year statute of limitations R.C.W. 4.16.080 (2) (R.R.S., Section 159 (2)) whether it was (1) an action in tort to recover damages for trespass to plaintiff's *personal property* (fishing license and location); or (2) an action to recover compensation for property damaged without condemnation proceedings. This holding was proper in view of the fact that the invasion of plain-

tiff's property was direct in character, not consequential, and thus of the type to which the three year limitation period is applicable.

*Constable v. John P. Duke* (1927) 144 Wash. 263, 257 Pac. 637

*Clark Lloyd Lumber Co. v. Puget Sound & C. Ry. Co.* (1916) 92 Wash. 601, 159 Pac. 774

It has already been demonstrated, supra, pp. 16-17, that the settling upon properties of fluoride solids emanating from an aluminum reduction plant constitutes an "indirect" and not a "direct" invasion or act. Therefore, the trial court and the Court of Appeals properly held that petitioners' claims of injury to personalty were subject to the provisions of R.C.W. 4.16.130 (R.R.S., Section 165)

## IV

**Petitioners failed to establish by a preponderance of the evidence that their cattle were injured as a result of respondent's operation of said plants.**

In their petition (pp. 2-3) petitioners have presented four questions. More of their petition is devoted to the last question (asserted injury to cattle) than any of the other three questions. Their argument relating to this issue is entirely a factual argument designed to

show that the *trial court* erred in its findings of fact on this point. As already demonstrated (supra, pp. 24-25), this court is loathe to consider such matters on a record such as the one involved herein. Because of this fact and because the evidence on this point was reviewed in detail in briefs submitted by the parties to the trial court and the Court of Appeals, respondent will confine itself merely to showing generally why the two lower courts found as they did.

Petitioners claim that certain findings of fact and conclusions of law of the trial court, which were affirmed by the Court of Appeals, were erroneous.

In the Arvidson action the court found (R-I-102-D):

> "Plaintiffs' cattle were not injured as a result of defendant's operation of its Troutdale aluminum reduction plant from December 7, 1948, to November 4, 1953."

In the Whiteaker action the court found similarly (R-I-208-B).

The court concluded in both actions (R-I-102-F, 208-D):

> "Plaintiffs did not sustain the burden of producing a preponderance of credible evidence to establish (a) fluorine content in the forage on their lands in amounts above non toxic limits; (b) substantial fluorine content in forage attributable to ef-

fluents from defendant's plants; or (c) that plaintiffs' land or cattle sustained fluorine damage in particulars and amounts that can be determined with reasonable or any certainty."

Petitioners devote 11 pages of the petition (pp. 41-52) to summarizing testimony of some of, but not all, the petitioners concerning their cattle. As to this testimony, the trial court stated (125 F. Supp. 482, 484):

"The evidence was closely followed as it was presented, copious notes taken and at the conclusion of the evidence the court made a memorandum summarizing its impression of each witness and the weight and value to be given to his testimony.

* * *

"All of the plaintiffs testified to personal observations of physical ailments and milk production performance of their cattle. Plaintiffs may have been sincere in believing that all of the ills of their cattle and all of the unsatisfactory conditions in their dairy operations were due to fluorine damage; however, rarely did a plaintiff voluntarily or readily acknowledge any cattle ailment, damage or unsatisfactory condition as being due to any other cause, no matter how apparent it might be. On the whole, the court was not favorably impressed with the personal testimony of plaintiffs. Almost every plaintiff on cross examination was badly discredited in various respects but primarily by (a) testimony at the trial directly contrary to testimony given by pretrial deposition; (b) reluctant admission of conditions and causes unrelated to fluorine accounting in many instances for the damage or condition complained of; (c) admission of substantial increases in

income from dairy products during the years complained of as contrasted to earlier periods when fluoride effluence was as much or greater; and (d) the testimony of some plaintiffs in the Arvidson case that no injurious effects or damage were observed from 1942 to 1945 during the period Alcoa was operating the Troutdale plant without the fume control improvements installed by defendant when fluoride effluents must have been very much greater than during the period complained of. It would appear from the testimony last referred to that the cattle injury and loss of milk production complained of were either not due in any material degree to fluorine or were the result of an accumulation of fluorine deposits in forage over a period including several years prior to the limitation period."

Petitioners also refer in detail to the testimony given by veterinarians called by petitioners (pp. 52-58) and veterinarians called by respondent (pp. 68-74). This testimony was also commented on by the trial court (125 F. Supp. 484):

"Each of the veterinarians examined all of the dairy cattle in plaintiffs' herds and cattle urine was tested for fluorine by defendant's veterinarians at various intervals during the period in question. Plaintiffs' veterinarians found a variety of physical conditions in the cattle which they considered evidence of fluorine ingestion and damage resulting therefrom. Defendant's veterinarians accounted for many of the ailments and defects referred to by ascribing them to other causes and categorically were of the opinion that none of the plaintiffs' cattle had suffered injury or damage in any respect by reason of fluorine ingestion, testifying that the urine

analysis supported such opinion. The court was favorably impressed with the ability, integrity and thoroughness of defendant's veterinarians and, to say the least, is of the opinion that there is no preponderance in favor of plaintiffs in the evidence of the veterinarians."

The court, of course, viewed many of the cattle involved (125 F. Supp. 482).

Reference is also made to the testimony of the various scientists who had been conducting experiments concerning the effects of fluorine (pp. 63-67). The court also took note of this testimony (125 F. Supp. 485-486):

"The court was much impressed with the ability, scientific attitude and credibility of Dr. Paul H. Phillips, Professor of Biochemistry at the University of Wisconsin, and Dr. Harold J. Schmidt of Stanford University Research Institute. Each is one of the very few top authorities in his scientific field and both testified in a frank and fair manner giving the impression of scientific candor and objectivity. These men have given special attention over a long period of time to the effects of fluorine ingestion in cattle and have personally conducted elaborate scientific experiments with extensive herds devoted exclusively to such purpose. Both Dr. Phillips and Dr. Schmidt testified without reservation that cattle could and actually had ingested fluorine over considerable periods in amounts far exceeding the maximum shown to have been available for ingestion by plaintiffs' animals without injurious effect either as to physical condition or milk production capacity. Plaintiffs' witness, Pro-

fessor Cheldelin, testified that in his opinion inorganic fluorine, such as found in the effluence from defendant's plants, after deposit on vegetation is absorbed in the plant cells and therein converted to organic fluorine developing thereby much more highly toxic powers; but he admitted that such theory has never been demonstrated or proven by actual experiment and, at the present stage of science, is merely a matter of theory not endorsed by scientists generally. The court accepts the testimony of Dr. Phillips and Dr. Schmidt at substantially full face value and in doing so cannot but conclude that on the issues covered by their testimony, plaintiffs have wholly failed to sustain the burden of proof resting on them in these cases."

## CONCLUSION

The decisions of the Court of Appeals for the Ninth Circuit as to the remedy available to petitioners and the applicable limitation period were in accordance with the substantive law of the State of Washington.

In view of the fact that the Court of Appeals determined that the findings of fact of the trial court were not clearly erroneous, this court should not review the evidence to determine the propriety of any of such findings.

The questions specifically presented by the petition for writ of certiorari to the Court of Appeals for the Ninth Circuit and the reasons relied on for allowance

of the writ are not of sufficient merit to warrant review on writ of certiorari.

Respectfully submitted,

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